DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-1059
Title: Genesis HealthCare Corporation, et al., Petitioners
v.
Laura Symczyk
Docketed: February 27, 2012
Linked with 11A570
Lower Ct: United States Court of Appeals for the Third Circuit
Case Nos.: (10-3178)
Decision Date: August 31, 2011
Rehearing Denied: October 20, 2011
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Dec 9 2011	Application (11A570) to extend the time to file a petition for a writ of certiorari from January 18, 2012 to February 17, 2012, submitted to Justice Alito.
Dec 13 2011	Application (11A570) granted by Justice Alito extending the time to file until February 17, 2012.
Feb 17 2012	Petition for a writ of certiorari filed. (Response due March 28, 2012)
Mar 12 2012	Waiver of right of respondent Laura Symczyk to respond filed.
Mar 21 2012	DISTRIBUTED for Conference of April 13, 2012.
Mar 21 2012	Motion for leave to file amicus brief filed by DRI - The Voice of the Defense Bar. (Distributed)
Mar 21 2012	Motion for leave to file amici brief filed by Chamber of Commerce of the United States of America, et al. (Distributed)
Mar 28 2012	Response Requested . (Due April 27, 2012)
Apr 24 2012	Order extending time to file response to petition to and including May 25, 2012.
May 25 2012	Brief of respondent Laura Symczyk in opposition filed.
Jun 5 2012	DISTRIBUTED for Conference of June 21, 2012.
Jun 5 2012	Reply of petitioner Genesis HealthCare Corporation, et al. filed. (Distributed)
Jun 25 2012	Motion for leave to file amici brief filed by Chamber of Commerce of the United States of America, et al. GRANTED.
Jun 25 2012	Motion for leave to file amicus brief filed by DRI - The Voice of the Defense Bar GRANTED.
Jun 25 2012	Petition GRANTED.
Jul 17 2012	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 30, 2012.
Jul 17 2012	The time to file respondent's brief on the merits is extended to and including October 19,

2012.

Jul 24 2012 Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.

Aug 30 2012 Brief of petitioners Genesis HealthCare Corporation, et al. filed.

Aug 30 2012 Joint appendix filed.

Sep 4 2012 Consent to the filing of amicus curiae briefs, in support of either party or neither party, received from counsel for the respondent.

Sep 6 2012 Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.

Sep 6 2012 Brief amicus curiae of ACA International filed.

Sep 6 2012 Brief amicus curiae of DRI - The Voice of the Defense Bar filed.

Sep 6 2012 Brief amicus curiae of Equal Employment Advisory Council filed.

Sep 14 2012 SET FOR ARGUMENT ON Monday, December 3, 2012.

Sep 14 2012 CIRCULATED

Oct 17 2012 Brief amicus curiae of the United States supporting affirmance filed. (Distributed)

Oct 19 2012 Brief of respondent Laura Symczyk filed. (Distributed)

Oct 26 2012 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Oct 26 2012 Brief amici curiae of Scholars Stephen B. Burbank, et al. filed. (Distributed)

Oct 26 2012 Brief amicus curiae of American Federation of Labor and Congress of Industrial Organizations filed. (Distributed)

Oct 26 2012 Brief amici curiae of The Impact Fund, et al. filed. (Distributed)

Oct 26 2012 Brief amici curiae of Service Employees International Union, et al. filed. (Distributed)

Oct 26 2012 Brief amici curiae of National Employment Lawyers Association, et al. filed. (Distributed)

Nov 13 2012 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Nov 16 2012 Reply of petitioners Genesis HealthCare Corporation, et al. filed. (Distributed)

Dec 3 2012 Argued. For petitioners: Ronald Mann, New York, N. Y. For respondent: Neal Kumar Katyal, Washington, D. C.; and Anthony A. Yang, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

11 – 1059
No. _____

FILED
FEB 17 2012
OFFICE OF THE CLERK

In The
Supreme Court of the United States

GENESIS HEALTHCARE CORPORATION
and ELDERCARE RESOURCES CORP.,

Petitioners,

v.

LAURA SYMCZYK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a case becomes moot, and thus beyond the judicial power of Article III, when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff's claims.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Genesis HealthCare Corporation is owned by FC-GEN Acquisition, Inc., which is owned by FC-GEN Acquisition Holding, LLC, which is owned by Health Care REIT, Inc. Of those entities, only Health Care REIT, Inc. is publicly traded.

Petitioner ElderCare Resources Corp. is owned by GHC Ancillary Corp., which is owned by Genesis HealthCare LLC, which is owned by GEN Operations II, LLC, which is owned by GEN Operations I, LLC, which is owned by FC-GEN Operations Investment, LLC. None of those entities is publicly traded.

The lone respondent is Laura Symczyk.

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PETITION FOR A WRIT OF CERTIORARI

Genesis HealthCare Corporation and ElderCare Resources Corp. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 656 F.3d 189. The opinion of the district court resolving the issues relevant to the petition (Pet. App. 30-44) is unreported. A related order of the district court entering a final judgment (Pet. App. 45-46) also is unreported.

JURISDICTION

The court of appeals entered judgment on August 31, 2011 and denied a timely petition for rehearing on October 20, 2011. Pet. App. 47-48. On December 13, 2011, Justice Alito extended the time within which to file a petition for a writ of certiorari to February 17, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the Constitution provides, in relevant part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under * * * the Laws of the United States * * * ."

29 U.S.C. 216(b) provides, in relevant part:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is

filed in the court in which such action is brought.

STATEMENT OF THE CASE

Petitioners offered to pay the lone respondent in this proceeding an amount conceded to provide all that she seeks in her complaint; yet the court of appeals refused to affirm the district court's decision to dismiss the matter as moot. Instead, the court of appeals revived this lawsuit-with-no-plaintiff and remanded it for proceedings to assess the possibility that respondent's attorneys can identify additional parties who might wish to join in litigation against petitioners.

1. For several months during 2007, respondent worked as a registered nurse at a facility in Philadelphia that was owned by a subsidiary of petitioner Genesis HealthCare Corporation. In December of 2009, after respondent had ceased working at that facility, she filed suit, alleging that petitioners had violated the Fair Labor Standards Act of 1938 (the "FLSA"), 29 U.S.C. 201 et seq., because her employer charged her for automatic meal break deductions without regard to whether she in fact took an uninterrupted break.

Relying on FLSA Section 216(b), respondent brought the action on behalf of herself and other similarly situated individuals. See Pet. App. 3-4, 31-32. To date, however, no other individual has opted to

join in the litigation. Thus, at all times since the filing of the complaint, respondent has been the sole plaintiff. See Section 216(b) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."); Pet. App. 3, 6 (opinion of court of appeals noting the absence of other plaintiffs), 42 (opinion of district court noting the same). See generally Hoffman-La Roche Inc. v. Sperling, 493 U.S. 165, 169-74 (1989) (explaining that the traditional rules for class litigation do not apply in litigation under Section 216(b), in which plaintiffs join only by affirmative acts of consent); see *id.* at 175-78 (Scalia, J., dissenting) (emphasizing distinction between class actions and actions under Section 216(b)).

2. On February 18, 2010, petitioners answered the complaint and served an offer of judgment under Fed. R. Civ. P. 68 for $7,500 in alleged unpaid wages, as well as "attorneys' fees, costs and expenses as determined by the Court." Although the offer fully satisfied her claims, respondent made no response. Because the offer to pay her claims in full deprived respondent of any ongoing personal stake in the litigation, petitioners on March 23, 2010 filed a motion to dismiss the case under Fed. R. Civ. P. 12(b)(1). See Pet. App. 4-5.

3. On May 19, 2010, the district court issued a detailed opinion tentatively granting the motion. Pet. App. 30-44. The court started from respondent's concession that the offer fully satisfied her claims. Pet.

App. 34. The court also noted the settled rule that an offer of full satisfaction under Rule 68 ordinarily moots a plaintiff's claim and thus ordinarily leads to dismissal. Pet. App. 35-36 (citing L.A. County v. Davis, 440 U.S. 625, 631 (1979); Weiss v. Regal Collections, 385 F.3d 337, 340 (CA3 2004)). The district court acknowledged that some courts had declined to dismiss collective actions under the FLSA even when a defendant had offered to make a plaintiff whole, but pointed out that in all but one of those cases the plaintiff already had moved for conditional certification or other individuals already had joined the action. Pet. App. 38-42.

The court embraced the distinction between a Rule 23 class action and a collective action under FLSA Section 216(b). In the former, class members are bound by the judgment unless they opt out; in the latter, the "plaintiff is deemed to represent himself only" unless others "take the affirmative step of opting in to the action." Pet. App. 39 (internal quotation marks omitted) (quoting Darboe v. Goodwill Industries, 485 F. Supp. 2d 221, 223-24 (E.D.N.Y. 2007)). In this case, because there were no plaintiffs with unsatisfied claims at the time of the motion to dismiss, and not even a pending motion for certification, the court concluded that dismissal of the FLSA claim was appropriate. Pet. App. 42-44.

4. After subsequent proceedings (not at issue here or in the court of appeals) in which the district court concluded that it was inappropriate to exercise

supplemental jurisdiction over state-law claims, the district court dismissed the case. Pet. App. 45-46.

5. The court of appeals reversed. Pet. App. 1-29. The court acknowledged that respondent retains no legally cognizable interest in the case, and that the lack of a justiciable controversy with the lone plaintiff ordinarily justifies immediate dismissal. Pet. App. 14 ("An offer of complete relief will generally moot the plaintiff's claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation."). The court concluded, however, that it would "frustrate the objectives of class actions" to allow a defendant's tender of judgment to "pic[k] off" multiple plaintiffs. Pet. App. 15 (quoting Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980)).

The court relied heavily on cases involving class actions. In that context, the court noted, several courts of appeals have held that a case does not become moot when the claims of a class representative become moot, on the theory that the certification of a class "relates back" to the filing of the complaint. Under the reasoning of those cases, for purposes of mootness analysis, all members of the class become parties as of the date of the complaint. Pet. App. 15-20 (citing Weiss v. Regal Collections, 385 F.3d 337 (CA3 2004)).

The court acknowledged the important differences between class actions under Fed. R. Civ. P. 23 and collective actions under Section 216(b): the plaintiff in a class action represents all members of the

class, and they are bound by a judgment even if they have not participated; a collective action under Section 216(b) binds (and benefits) only those individuals that affirmatively opt into the case. Pet. App. 21-22. The court also noted the history of Section 216(b), which Congress amended in 1947 to prohibit representative actions. Pet. App. 22 n.11.

Ultimately, however, the court of appeals dismissed the significance of the differences between class actions and Section 216(b) and extended the class action precedents to the FLSA context. It worried that a mootness inquiry "predicated inflexibly on whether any employee has opted in to an action" would make it too easy for employers to dispose of litigation (by paying full satisfaction to all plaintiffs). Pet. App. 23-24. The court also relied heavily on its sense of the "considerations that caution against allowing [settlement offers] to impede the advancement of a representative action." Pet. App. 25-27. Concluding that a contrary decision would "facilitat[e] an outcome antithetical to the purposes behind § 216(b)" (Pet. App. 26), the court ordered that the action proceed. Pet. App. 28.

6. Petitioner filed a timely petition for rehearing, which the court of appeals denied without opinion on October 20, 2011. Pet. App. 47-48.

REASONS FOR GRANTING THE PETITION

From the first years of this Court's existence (Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 n. (1792)), the Court has taken special care to enforce Article III's limitation of the judicial power to actual Cases and Controversies. E.g., Arizona Christian School Tuition Org. v. Winn, 131 S. Ct. 1436, 1441-42 (2011). Subordinating that limitation to pragmatic concerns about judicial access and statutory policy, the court of appeals has lost sight of Article III, permitting litigation to continue against petitioners despite the absence of any adverse party: petitioners have offered the lone plaintiff in this case everything she sought in her complaint. The only beneficiaries of further litigation are respondent's counsel and future parties, as yet unidentified, who might join the litigation if it continues. Because the confusion into which the courts of appeals have fallen overlooks constitutional limitations on the judicial power, only this Court can resolve the issue.

I. The Judicial Power Does Not Extend to a Dispute in Which the Defendants Offer Full Relief to the Lone Plaintiff.

The compelling need for guidance to the lower courts is underscored by the simplicity with which the existing precedents of this Court resolve the case. The first step is to consider the dispute between petitioners and respondent Symczyk. She sought

monetary relief for alleged violations of the FLSA.[1] Petitioners responded by offering all the relief that she sought. Respondent conceded that petitioners' offer was adequate. Pet. App. 4, 32. Thus, respondent has no continuing stake in the litigation, nothing more to gain from its continuing pursuit. It is hornbook law that an offer to accord all relief that a plaintiff demands moots a case unless the plaintiff retains some additional stake in continuing litigation. Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 332-33 (1980).[2] Unless something additional is at stake, the dispute no longer involves a "Case" that a federal court can adjudicate.

The styling of the complaint as seeking relief on behalf of others "similarly situated" does not provide the necessary stake. It bears repeating that this is not a class action (in which a class representative represents the interest of absent class members), but rather a collective action under Section 216(b) of the FLSA. The distinction is not technical, but

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[1] Because the complaint in this case sought relief under Sections 206 and 207 of the FLSA, and sought no relief under Section 215(a)(3) (see First Amended Complaint ¶¶ 1, 42, and 62, Pet'r's C.A. App. 83, 89, 93), this case arises under the first sentence of Section 216(b), which does not authorize equitable relief. 29 U.S.C. 216(b); see Sandoz v. Cingular Wireless LLC, 553 F.3d 913, 921 n.6 (CA5 2008).

[2] See Rand v. Monsanto Co., 926 F.2d 596, 598 (CA7 1991); Weiss v. Regal Collections, 385 F.3d 337, 340 (CA3 2004); 13B Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3533.2, at 800-806 (3d ed. 2008 (Supp. 2011)).

substantive. See *Hoffman-La Roche Inc.*, 493 U.S. at 175-78 (Scalia, J., dissenting) (emphasizing the differences between class actions and FLSA actions under Section 216(b)). As this Court explained in *Hoffman-La Roche Inc.*, Congress more than half a century ago "abolished" the "representative action" previously available under the FLSA, driven by concerns about "excessive litigation spawned by plaintiffs lacking a personal interest in the outcome." 493 U.S. at 173.

To be sure, Section 216(b) includes a provision by which other similarly situated individuals eventually could have joined the litigation. But respondent does not "represent" those individuals, and until one of them chooses to join the litigation she is the only party seeking relief. In the words of Chief Justice Marshall, any possible dispute between petitioners and those individuals "becomes a case" for purposes of Article III only when "a party * * * asserts his rights in the form prescribed by law," Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 819 (1824) (quoted in *Hoffman-La Roche Inc.*, 493 U.S. at 175-76 (Scalia, J., dissenting)); cf. Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 773 (2000) (explaining that there can be no Article III standing on the part of an assignee until some claim has been assigned).

Because none of those other individuals has yet joined this litigation, there is no possibility that a judgment here (favorable or unfavorable) would bind them. See Section 216(b) ("No employee shall be a

party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."). Thus, the absent parties indisputably lack the "personal stake in the outcome" necessary for exercise of the judicial power, Lujan v. Defenders of Wildlife, 504 U.S. 555, 583 (1992).[3] In sum, because there is not yet, for purposes of Article III, a "Case" (or a "Controvers[y]") between petitioners and any of those as yet unidentified individuals, the only relevant dispute is the one with respondent that has been mooted by petitioners' offer.

Neither *Roper* nor its companion (United States Parole Commission v. Geraghty, 445 U.S. 388 (1980)) supports a contrary decision. First, *Roper* itself rests on the plaintiff's continuing financial interest in class certification – the plaintiff's ability to shift fees to other members of the class. *Roper*, 445 U.S. at 334 n.6, 336 (discussing "desire [of plaintiffs] to shift part of the costs of litigation"); see *Roper*, 445 U.S. at 343 n.2 (Stevens, J., concurring) (agreeing with that point); *Roper*, 445 U.S. at 345-47 (Powell, J., dissenting) (characterizing this as the holding of the *Roper* Court). Because the offer in this case extended to all

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[3] See Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 103 n.5 (1998) (asking "whether a plaintiff personally would benefit in a tangible way from the court's intervention" (citation, emphasis, and internal quotation marks omitted)); Flast v. Cohen, 392 U.S. 83, 100-01 (1968); Baker v. Carr, 369 U.S. 186, 204 (1962).

costs and fees incurred by respondent, she has no continuing individual stake of her own and thus no claim under the reasoning of *Roper*.

Second, to the extent *Roper* discussed (without relying on) "the responsibility of named plaintiffs to represent the collective interests of the putative class," 445 U.S. at 331, it discussed a form of litigation that is not relevant in this action under Section 216(b). Again, respondent has no responsibility to any as-yet unidentified individuals who might allege similar treatment. Even if she did, *Geraghty*'s holding that a putative class representative can appeal the denial of a class certification when the representative's claim becomes moot (445 U.S. at 404) has no relevance to a case in which no motion for certification (or even its FLSA analogue) has been filed (much less denied).

The argument that the termination of the plaintiff's personal stake takes the case outside Article III is a strong one. See *Geraghty*, 445 U.S. at 409-24 (Powell, J., dissenting). But the facts of *Roper* and *Geraghty* at least presented a conceptual foundation for allowing the litigation to continue – the interests of the class on whose behalf the named representative brought the litigation. See *Roper*, 445 U.S. at 341 (Rehnquist, J., concurring) (concluding that the decision in *Roper* could be justified because "the defendant ha[d] not offered all that ha[d] been requested in the complaint (i.e., relief for the class)"). Because the class representative can bind other members of the class, it makes some sense to recognize the

representative as obligated to absent members, and thus to recognize a continuing controversy even when the individual claims of the named representatives dissipate. Cf. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011) (emphasizing that "a class representative must * * * possess the same interest and suffer the same injury as the class members" (citations and internal quotation marks omitted)). That foundation has no relevance in this case under the FLSA, from which Congress explicitly and intentionally has removed any possibility of a representative action, specifically to limit the pursuit of litigation "by plaintiffs lacking a personal interest in the outcome," *Hoffman-La Roche Inc.*, 493 U.S. at 173. Again, because no judgment in this case could either benefit, or burden, any of the potential plaintiffs, they have no Article III dispute with petitioners. See Sprint Communications Co., L.P. v. APCC Services, 554 U.S. 269, 298-99 (2008) (Roberts, C.J., dissenting) (Article III requires dismissal when "[r]espondents have nothing to gain from their lawsuit").

The absence of any concrete controversy is underscored by the justifications the court of appeals offered to sustain its decision. The court of appeals did not think it necessary even to speculate about what controversy might exist between petitioners and any potentially adverse party. Rather, it relied entirely on its sense of "incentive[s]" and "strategi[es]" to avoid a decision that "inflexibly" would require the existence of an active controversy. Pet. App. 22-23. That purposive analysis divorces the relatively

unexceptionable holding in *Roper* from the factual underpinnings of a controversy that was identifiable in fact, a dispute that would affect the interests of identifiable parties. Compare Spencer v. Kemna, 523 U.S. 1, 11 (1998) (criticizing a "parsimonious view of the function of Article III standing" that accepts the "remote possibility of collateral consequences as adequate to [avoid mootness]"). By allowing the idiosyncratic policy intuitions of individual judges to stand in the place of a personal stake in the litigation, the court has strayed beyond constitutional limits.

II. The Question Presented Warrants This Court's Attention.

A. The Lower Courts Are in Disarray.

The failure of the lower courts to draw coherent guidance from the deeply fractured decisions in *Roper* and *Geraghty* has led to widespread, widely recognized, and steadily deepening confusion about the most basic questions of justiciability in this context.[4] Because the relevant issues have shifted so much since the Court's decisions in *Roper* and *Geraghty* at the dawn of the class-action era, the lower courts have taken to resolving these questions through the parsing of their own precedents. As the discussion

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[4] See Symczyk v. Genesis HealthCare Corp., No. 09-CV-5782 (E.D. Pa.) (transcript of Dec. 20, 2011 hearing on remand from court of appeals decision), at 25, 44, 45 (expressing frustration about the "confusing area" of the law and repeatedly noting the "conflict" in the circuits).

above illustrates, they have lost sight of the core principles that animate (and confine) this Court's decisions in *Roper* and *Geraghty*. Thus, lacking guidance from this Court in the FLSA context, some courts have extended *Roper* and *Geraghty* without recognizing the importance of the differences between Rule 23 and Section 216(b). Others, failing to notice the factual context that supported the narrow majorities in *Roper* and *Geraghty*, have discounted the importance of an ongoing controversy. Those courts have extended *Roper* and *Geraghty* to justify continuing adjudication even when the original controversy has dissipated before the plaintiff has sought to certify a case for collective adjudication. The disparate analysis of those two problems has produced disarray that only this Court can redress.

1. First, the courts of appeals have taken diametrically opposed approaches to the extension of *Roper* and *Geraghty* to FLSA cases. On the one hand, the Ninth and Eleventh Circuits have emphasized the difference between class actions under Rule 23 and collective actions under Section 216(b). The key decision here is the Eleventh Circuit's ruling in *Cameron-Grant v. Maxim Healthcare Services, Inc.*, 347 F.3d 1240 (2003). After a careful and thorough discussion of *Roper*, *Geraghty*, and the history of Section 216(b) (347 F.3d at 1245-49), that court concluded that because "§ 216(b) is a fundamentally different creature than the Rule 23 class action, * * * the § 216(b) plaintiff * * * has no right to represent [similarly situated individuals]," 347 F.3d at 1249. The court

reasoned that until other individuals join the Section 216(b) case, "no person will be bound by or may benefit from judgment." 347 F.3d at 1249 (citation and quotation marks omitted). Accordingly, the court held, an action under Section 216(b) became moot when the last remaining named plaintiff settled his claims. 347 F.3d at 1249. Six years later, the Ninth Circuit followed *Cameron-Grant* to a similar conclusion. See Smith v. T-Mobile USA, Inc., 570 F.3d 1119, 1122-23 (2009) (holding that an FLSA plaintiff that settles individual claim has no justiciable interest in appealing adverse decision on certification of collective action).

On the other side are the Third and Fifth Circuits, which have uncritically extended the decisions in *Roper* and *Geraghty* from the class action context to FLSA actions under Section 216(b). As summarized above, the Third Circuit in this case consciously followed the Fifth Circuit's decision in *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913 (2008). Like *Cameron-Grant* and this case, *Sandoz* involved a collective action under Section 216(b). The defendant responded to the complaint with an offer under Rule 68 to provide the plaintiff all the relief sought in the complaint. The district court declined to dismiss the case, but instead allowed the plaintiff to file a motion to certify the case for collective action. On appeal, the Fifth Circuit affirmed. The court acknowledged the "fundamental, irreconcilable difference between the class action described by Rule 23 and that provided

for by FLSA [§ 216(b)]." 553 F.3d at 916. Specifically, the court explained:

> In a Rule 23 proceeding a class is described; if the action is maintainable as a class action, each person within the description is considered to be a class member and, as such, is bound by judgment, whether favorable or unfavorable, unless he has "opted out" of the suit. Under [§ 216(b)] of FLSA, on the other hand, no person can become a party plaintiff and no person will be bound by or may benefit from judgment unless he has affirmatively "opted into" the class; that is, given his written, filed consent.

553 F.3d at 916 (quoting LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 288 (CA5 1975) (per curiam)) (brackets by *Sandoz* panel). The court cited *Cameron-Grant* and noted that "[t]he Eleventh Circuit is the only other circuit that has addressed the same type of scenario." 553 F.3d at 917. The *Sandoz* panel acknowledged that the only difference between the facts of *Cameron-Grant* and the facts of *Sandoz* was a technicality the panel regarded as irrelevant – the type of settlement (voluntary in *Cameron-Grant* and instigated by Rule 68 in *Sandoz*). 553 F.3d at 917 n.3. The court even went so far as to "find persuasive the Eleventh Circuit's ruling in *Cameron-Grant* that there is a difference between when a Rule 23 class action and a FLSA collective action can become moot, because, * * * in a FLSA collective action the plaintiff represents only him- or herself until

similarly-situated employees opt in." 553 F.3d at 919 (citing *Cameron-Grant*, 347 F.3d at 1249).

Still, without identifying any error in the reasoning of *Cameron-Grant*, or specifying any factual distinction that might render that reasoning inapplicable, the *Sandoz* panel concluded that the settlement of the named plaintiff's claim was not enough to moot the case. Motivated by concerns of judicial policy, the court noted the "incentive for employers to use Rule 68 as a sword, 'picking off' representative plaintiffs and avoiding ever having to face a collection action." 553 F.3d at 919. To solve that problem, the court adopted a rule under which a plaintiff that files a motion for certification in a reasonable time can avoid mootness by having the effectiveness of the certification relate back to the date of the complaint. 553 F.3d at 920-21. Because the plaintiff's thirteen-month delay arguably was unreasonable, the panel remanded the case to the district court for further consideration of the reasonableness of the delay. 553 F.3d at 921.

The decisions in this case and in *Sandoz* are contrary to the results in *Smith* and in *Cameron-Grant*. Here and in *Sandoz*, the claim of the only person to enter litigation against the defendant became moot. In each case, the plaintiff's only relation to similarly situated individuals was the possibility that those individuals at some later point in the future might have chosen to join the action. But in *Cameron-Grant* and *Smith*, the possibility of later joinder was held insufficient to justify the continued

exercise of jurisdiction by an Article III court. Application of the rule of those cases would have led to immediate and unconditional dismissal in *Sandoz* and in the decision below.

2. The decision below also brings into play a second problem on which the courts of appeals are in even deeper conflict: whether the potential for a not-yet-filed motion to certify a collective proceeding is enough to bring a case within the rule of *Roper*. At bottom, the question is whether a certification motion can revive a controversy when it is filed after the named party has lost any continuing interest in the dispute. As discussed above, the court of appeals in this case held that the doctrine of "relation back," articulated in Weiss v. Regal Collections, 385 F.3d 337 (CA3 2004), justified continuing jurisdiction over a case despite dissipation of the interest of the named plaintiff, because any subsequent certification would "relate back" to the complaint. The premise of this "relation back" doctrine lies not in the text of Rule 23 or Section 216(b) (much less the principles of Article III). Rather, it rests on the felt need to prevent defendants from "picking off" class plaintiffs, which is thought to justify treatment of the as-yet unidentified plaintiffs, for mootness and Article III purposes, as adverse parties from the moment that the complaint is filed. *Weiss*, 385 F.3d at 344-45. At least three courts of appeals have accepted the Third Circuit's line of reasoning on that point. Sandoz v. Cingular Wireless LLC, 553 F.3d 913, 920-21 (CA5 2008) (following *Weiss*); Lucero v. Bureau of Collection

Recovery, Inc., 639 F.3d 1239, 1247-50 (CA10 2011) (discussing *Weiss* and *Sandoz*); Pitts v. Terrible Herbst, Inc., 653 F.3d 1081, 1091-92 (CA9 2011) (following *Weiss*, *Sandoz*, and *Lucero*).

At the same time, the Seventh Circuit, joining the Fourth and Eighth Circuits, has directly rejected the relation back doctrine, despite the acknowledged conflict. See Damasco v. Clearwire Corporation, 662 F.3d 891 (2011). The Seventh Circuit in *Damasco* explained its customary understanding that a settlement with a named plaintiff moots a collective proceeding if it "comes before class certification is sought." 662 F.3d at 895 (quoting Greisz v. Household Bank (Ill.), N.A., 176 F.3d 1012, 1015 (CA7 1999)). The *Damasco* panel noted that "[f]our circuits disagree with this approach, but we have not been moved to reverse course." *Id.* at 895 (citing the contrary decisions of the Third, Fifth, Ninth, and Tenth Circuits discussed above).

Damasco keeps the Seventh Circuit in line with the established rejection of the relation back doctrine by the Fourth and Eighth Circuits. Indeed, those courts go even farther, holding that even a pending certification motion is insufficient to keep a case alive when the controversy with the named plaintiff dissipates. Thus, in the Eighth Circuit, "voluntary settlements reached by the named plaintiffs [in a class action render] the entire case * * * moot," even if a motion for class certification is under consideration at the time. Anderson v. CNH U.S. Pension Plan, 515 F.3d 823, 826-27 (2008). Similarly, the Fourth Circuit,

acknowledging the disarray among the courts of appeals, recently held that "when a putative class plaintiff voluntarily dismisses the individual claims underlying a request for class certification, there is no longer a 'self-interested party advocating' for class treatment in the manner necessary to satisfy Article III." Rhodes v. E.I. du Pont de Nemours & Co., 636 F.3d 88, 100 (2011); see *id.* at 100 (noting that "[o]ther circuit courts addressing this issue have reached different conclusions").

Had this case been filed in the Fourth, Seventh, or Eighth Circuits, it plainly would have been dismissed as moot. At the time petitioners' offer mooted respondent's interest in the case, respondent had not yet sought certification of a collective proceeding. Accordingly, any of those courts would have affirmed the decision of the district court. The willingness of the court of appeals to rely on the possibility of a future motion as a basis for continued adjudication is directly contrary to the reasoning of those courts.

The diverging perspectives are entrenched, and percolation over the last year has served only to deepen the existing split, with the Ninth and Tenth Circuits adding themselves to the "relation back" camp, the Fourth Circuit rejecting that rule, and the Seventh Circuit reiterating its unwillingness to shift to that rule. The increasingly clear disparity of result is particularly troublesome for national employers, exposed to the ability of counsel to initiate suit in

those circuits that take a flexible and pragmatic approach to mootness.

B. This Case Is an Ideal Vehicle for Resolving the Conflict.

Several features of this case make it an ideal vehicle for addressing the set of overlapping issues discussed above. None of the relevant facts is disputed, and the petition thus presents the legal questions cleanly. For example, because petitioners' offer was admittedly adequate, the case avoids a factual issue that clouds the analysis in some of the cases. Cf. Simmons v. United Mortgage and Loan Investment, 634 F.3d 754 (CA4 2011) (case not moot because Rule 68 offer inadequate).

More fundamentally, because the case has the most extreme facts favoring mootness of any of the cases yet to reach the courts of appeals, it affords this Court an opportunity to address both of the extant conflicts directly. On plenary review, respondent would prevail only if the Court held in her favor on both of the divisive questions: whether *Roper* and *Geraghty* extend to FLSA cases; and whether *Roper* and *Geraghty* apply when the plaintiff's claim is mooted before the filing of a motion to certify a collective proceeding. Review of a case under Rule 23 (like *Damasco*) would not afford an opportunity to address the FLSA/Rule 23 controversy. Review of a case in which a certification motion was already filed (like *Rhodes*) would afford an incomplete opportunity to

address the "relation back" doctrine. This is the first petition to reach the Court since *Damasco* summarized (and deepened) the conflict in the court of appeals. It appears to be the only case currently pending on appeal that would put the entire range of issues before the Court.

C. The Willingness of Lower Courts to Elevate Ungrounded Policy Concerns over Article III Principles Warrants This Court's Immediate Attention.

Even aside from the disparate decisions of the courts of appeals, the decision of the court below to revive this lawsuit-with-no-plaintiff warrants review by this Court because of the perverse incentives it creates for the litigation process. Two points are salient. First, the decision below rests on a fundamentally wrongheaded distaste for settlement. Petitioners responded to a suit under a federal regulatory statute with a prompt and unconditional offer to pay respondent every penny she requested, no questions asked. Still, despite that offer, petitioners, years later, bear the cost and expense of discovery, motion practice, and related litigation in the district court, all for the purpose of determining whether the lawyers representing respondent can identify another plaintiff willing to join the litigation against petitioners. It is one thing for a defendant to incur those costs when there is a controversy with an existing plaintiff, but to impose those costs in a case with no adverse plaintiff stands on its head this Court's traditional

solicitude for rules that facilitate settlement. E.g., Marek v. Chesny, 473 U.S. 1, 10 (1985); St. Louis Mining & Milling Co. v. Montana Mining Co., 171 U.S. 650, 656 (1898). Again, this is not a plaintiff driven by exiguity of resources to accept a lowball settlement: this is a plaintiff offered every penny that she sought. See *Roper*, 445 U.S. at 349 n.6 (Powell, J., dissenting) ("We may assume that respondents had some interest in the class-action procedure as a means of interesting their lawyers in the case or obtaining a satisfactory settlement * * * , but once respondents obtained both access to court and full individual relief that interest disappeared.").

Second, for similar reasons, the decision below buttresses the unfortunate tendency of the lower courts to foster "excessive litigation spawned by plaintiffs lacking a personal interest in the outcome," *Hoffman-LaRoche Inc.*, 493 U.S. at 173. As the case comes to this Court, there is no claimant who will gain – or lose – from this Court's disposition of this matter. See *Geraghty*, 445 U.S. at 414 (Powell, J., dissenting) (ridiculing idea that Article III could accommodate "a lawsuit that has no plaintiff"); Sprint Communications Co., L.P. v. APCC Services, 554 U.S. 269, 298-99 (2008) (Roberts, C.J., dissenting) (Article III requires dismissal when "[r]espondents have nothing to gain from their lawsuit"). The only individuals with anything to gain (or lose) are the attorneys who represented respondent before her interest in the case became moot. See *Roper*, 445 U.S. at 353 (Powell, J., dissenting) ("Apart from the

persistence of the lawyers, this has been a noncase since the petitioner tendered full satisfaction of the respondents' individual claims.").

It is reprehensible when this occurs in the class context. Cf., e.g., Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2559 (2011) (detailing "perverse incentives" of class representatives to take actions that harm interests of class members). But it is inexplicable when it occurs in FLSA litigation, where Congress more than a half-century ago stepped in to ban representative litigation. Compare *Hoffman-La Roche Inc.*, 493 U.S. at 173 (discussing Congress's intention to "fre[e] employers of the burden of representative actions"), with Pet. App. 22-27 (conclusion of the court below that the importance of fostering representative actions under the FLSA justifies a "flexible" attitude to traditional mootness doctrine). As the Court recently had occasion to emphasize, it "would be inimical to the Constitution's democratic character" for "the federal courts to decide questions of law arising outside of cases and controversies," *Arizona Christian School Tuition Org. v. Winn*, 131 S. Ct. 1436, 1442 (2011). Only this Court can redirect the attention of the courts of appeals to the limitations Article III imposes on exercise of the judicial power. See Spencer v. Kemna, 523 U.S. 1, 11 (1998) (emphasizing the importance of the "constitutional requirement [a]s a means of defining the role assigned to the judiciary in a tripartite allocation of power" (citation and internal quotation marks omitted)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RONALD J. MANN

February 2012

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10-3178

LAURA SYMCZYK, an individual, on behalf of herself and others similarly situated,
Appellant

v.

GENESIS HEALTHCARE CORPORATION; ELDERCARE RESOURCES CORPORATION d/b/a GENESIS ELDERCARE

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Civil Action No. 09-cv-05782
(Honorable Michael M. Baylson)

Argued March 7, 2011

Before: SCIRICA, AMBRO and VANASKIE,
Circuit Judges.

(Filed: August 31, 2011)

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OPINION OF THE COURT

SCIRICA, *Circuit Judge.*

Laura Symczyk sought relief under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 207 and 216(b), on behalf of herself and all others similarly situated. The District Court for the Eastern District of Pennsylvania dismissed Symczyk's complaint for lack of subject matter jurisdiction after defendants Genesis HealthCare Corporation and ElderCare Resources Corporation extended an offer of judgment under Fed. R. Civ. P. 68 in full satisfaction of her

alleged damages, fees, and costs. At issue in this case is whether a collective action brought under § 216(b) of the FLSA becomes moot when, prior to moving for "conditional certification" and prior to any other plaintiff opting in to the suit, the putative representative receives a Rule 68 offer. We will reverse and remand.

I.

From April 2007 through December 2007, Symczyk was employed by defendants as a Registered Nurse at Pennypack Center in Philadelphia, Pennsylvania. On December 4, 2009, Symczyk initiated a collective action under 29 U.S.C. § 216(b) on behalf of herself and all similarly situated individuals, alleging defendants violated the FLSA when they implemented a policy subjecting the pay of certain employees to an automatic meal break deduction whether or not they performed compensable work during their breaks.[1]

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[1] Symczyk's amended complaint identified those "similarly situated" as

> All persons employed within the three years preceding the filing of this action by Defendants . . . , whose pay was subject to an automatic 30 minute meal period deduction even when they performed compensable work during the unpaid "meal break". . . .
>
> These persons include, but are not limited to, secretaries, housekeepers, custodians, clerks, porters, registered nurses, licensed practical nurses, nurses' aides, administrative assistants, anesthetists, clinicians, medical coders, medical underwriters, nurse case managers,

(Continued on following page)

On February 18, 2010, defendants filed an answer to Symczyk's complaint and served her with an offer of judgment under Fed. R. Civ. P. 68 in the amount of "$7,500.00 in alleged unpaid wages, plus attorneys' fees, costs and expenses as determined by the Court."[2] Symczyk did not dispute the adequacy of defendants' offer but nevertheless declined to respond.

The District Court – unaware of the offer of judgment – held a Fed. R. Civ. P. 16 scheduling conference on March 8, 2010. Two days later, the court entered a scheduling order providing for "an initial ninety (90) day discovery period, at the close of which [Symczyk]

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nurse interns, nurse practitioners, practice supervisors, professional staff nurses, quality coordinators, resource pool nurses, respiratory therapists, senior research associates, operating room coordinators, surgical specialists, admissions officers, student nurse technicians, trainers, and transcriptionists employed at any of Defendants' facilities during the three years preceding the filing of this action.

[2] In part, Fed. R. Civ. P. 68 provides:

(a) At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(b) An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

will move for conditional certification under § 216(b) of the FLSA." Following the court's ruling on certification, the parties were to have "an additional six (6) month discovery period, to commence at the close of any Court-ordered opt-in window."

On March 23, 2010, defendants filed a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), contending that, because Symczyk had effectively rejected their Rule 68 offer of judgment, *see* Fed. R. Civ. P. 68(a) (providing a plaintiff with 14 days to accept an offer), she "no longer ha[d] a personal stake or legally cognizable interest in the outcome of this action, a prerequisite to this Court's subject matter jurisdiction under Article III of the United States Constitution." Symczyk objected, citing defendants' strategic attempt to "pick off" the named plaintiff before the court could consider her "certification" motion.[3]

On May 19, 2010, the District Court "tentatively concluded" that defendants' Rule 68 offer mooted the collective action and that the action should be

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[3] On March 29, 2010, defendants removed Symczyk's related state-court action to the United States District Court for the Eastern District of Pennsylvania. Thereafter, on April 13, 2010, the parties jointly filed a proposed stipulated order providing Symczyk would voluntarily dismiss her related state-law action and amend her complaint in this action to include those state-law claims asserted in the related action. The District Court entered the parties' stipulated order on April 15, 2010, and Symczyk filed an amended class/collective action complaint on April 23, 2010.

dismissed for lack of subject matter jurisdiction. *Symczyk v. Genesis HealthCare Corp.*, No. Civ. A 09-5782, 2010 U.S. Dist. LEXIS 49599, at *17 (E.D. Pa. May 19, 2010). In its memorandum, the court explained:

> Symczyk does not contend that other individuals have joined her collective action. Thus, this case, like each of the district court cases cited by Defendants, which concluded that a Rule 68 offer of judgment mooted the underlying FLSA collective action, involves a single named plaintiff. In addition, Symczyk does not contest Defendants' assertion that the 68 offer of judgment fully satisfied her claims. . . .

Id. at *16-17. The court instructed Symczyk to file a brief in support of continued federal jurisdiction on her state-law claims and her motion for class certification under Fed. R. Civ. P. 23 by June 10, 2010. *Id.* at *17. Symczyk did so but conceded she did not believe the court possessed an independent basis for jurisdiction over her state-law claims in the event her FLSA claim was dismissed. The District Court declined to exercise supplemental jurisdiction over Symczyk's state-law claims in accordance with 28 U.S.C. § 1367(c) and dismissed those claims without prejudice. The court also dismissed Symczyk's FLSA

claim with prejudice in accordance with its earlier memorandum. Symczyk timely appealed.[4]

II.

A.

Enacted in 1938, the FLSA, 29 U.S.C. § 201 *et seq.*, was designed "to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." *Brooklyn Sav. Bank v. O'Neil,* 324 U.S. 697, 707 n.18 (1945). Under the "collective action" mechanism set forth in 29 U.S.C. § 216(b), an employee alleging an FLSA violation may bring an action on "behalf of himself . . . and other employees similarly situated," subject to the

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[4] Prior to dismissing the action, the District Court had subject matter jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § 216(b). We exercise appellate jurisdiction pursuant to 28 U.S.C. § 1291. Our review of the court's order granting defendants' motion to dismiss for lack of subject matter jurisdiction is plenary. *Gould Elecs., Inc. v. United States,* 220 F.3d 169, 176 (3d Cir. 2000). Because defendants' motion to dismiss was based on facts outside the pleadings (i.e., their Rule 68 offer of judgment), the trial court was entitled to weigh and evaluate the evidence bearing on the jurisdictional dispute. *Mortensen v. First Fed. Sav. & Loan Ass'n,* 549 F.2d 884, 891 (3d Cir. 1977). This factual evaluation "may occur at any stage of the proceedings." *Id.* "When subject matter jurisdiction is challenged under Rule 12(b)(1), the plaintiff must bear the burden of persuasion." *Kehr Packages, Inc. v. Fidelcor, Inc.,* 926 F.2d 1406, 1409 (3d Cir. 1991).

requirement that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."

Prior to 1947, the FLSA permitted an aggrieved employee to "designate an agent or representative to maintain such action for and in behalf of all employees similarly situated." *Martino v. Mich. Window Cleaning Co.*, 327 U.S. 173, 175 n.1 (1946) (quoting Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 16(b), 52 Stat. 1060, 1069 (1938)). But in response to "excessive litigation spawned by plaintiffs lacking a personal interest in the outcome," Congress amended the Act to eliminate "representative action by plaintiffs not themselves possessing claims." *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989); *see also* Portal-to-Portal Act of 1947, Pub. L. No. 80-49, § 5(a), 61 Stat. 84, 87 (1947). Further altering the collective action procedure in § 216(b), Congress inserted a requirement that similarly situated employees must affirmatively "opt in" to an ongoing FLSA suit by filing express, written consents in order to become party plaintiffs. *See id.*

In deciding whether a suit brought under § 216(b) may move forward as a collective action, courts typically employ a two-tiered analysis. During the initial phase, the court makes a preliminary determination whether the employees enumerated in the complaint can be provisionally categorized as similarly situated to the named plaintiff. If the plaintiff

carries her burden at this threshold stage, the court will "conditionally certify" the collective action for the purposes of notice and pretrial discovery. In the absence of statutory guidance or appellate precedent on the proper definition of "similarly situated," a divergence of authority has emerged on the level of proof required at this stage. Some trial courts within our circuit have allowed a plaintiff to satisfy her burden simply by making a "substantial allegation" in her pleadings that she and the prospective party plaintiffs suffered from a single decision, plan or policy, but the majority of our circuit's trial courts have required the plaintiff to make a "modest factual showing" that the proposed recipients of opt-in notices are similarly situated. *See Wright v. Lehigh Valley Hosp.*, No. Civ. A 10-431, 2010 U.S. Dist. LEXIS 86915, at *7-10 (E.D. Pa. Aug. 24, 2010) (canvassing cases).

Under the "modest factual showing" standard, a plaintiff must produce some evidence, "beyond pure speculation," of a factual nexus between the manner in which the employer's alleged policy affected her and the manner in which it affected other employees. *See Smith v. Sovereign Bancorp, Inc.*, No. 03-2420, 2003 U.S. Dist. LEXIS 21010, at *10 (E.D. Pa. Nov. 13, 2003). We believe the "modest factual showing" standard – which works in harmony with the opt-in requirement to cabin the potentially massive size of collective actions – best comports with congressional intent and with the Supreme Court's directive that a court "ascertain[ ] the contours of [a collective] action

at the outset." *See Hoffmann-La Roche,* 493 U.S. at 172.[5]

After discovery, and with the benefit of "a much thicker record than it had at the notice stage," a court following this approach then makes a conclusive determination as to whether each plaintiff who has

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[5] Although this two-step approach is nowhere mandated, it appears to have garnered wide acceptance. And, while courts retain broad discretion in determining whether to "conditionally certify" a collective action, it is useful to prescribe a uniform evidentiary standard. *Cf. In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316-20 (3d Cir. 2008) (outlining the guiding principles for a district court's discretionary evaluation of a class certification motion in the Rule 23 context).

This case illustrates how an uncertain standard may work to the detriment of § 216(b) plaintiffs. Here, the court – unaware of defendants' Rule 68 offer – issued a case management order allotting Symczyk "an initial ninety (90) day discovery period" to compile evidence before she would be expected to move for "conditional certification." Symczyk represents she considered the standard for "conditional certification" a "moving target in our circuit" and requested discovery in order to buttress the allegations in her pleadings with sufficient evidence to make a "meaningful motion" at this initial stage. Because defendants' Rule 68 offer preceded the commencement of this preliminary discovery period, however, Symczyk had no opportunity to gather such evidence before the court granted defendants' motion to dismiss. Had Symczyk been operating under the assumption that the court would employ the "substantial allegation" standard, she may have been prepared to move for "conditional certification" without conducting minimal discovery. And, had the court in fact facilitated notice to potential opt-ins based solely on the allegations in Symczyk's complaint, defendants' Rule 68 offer may not have antedated the arrival of a consent form from a party plaintiff, an occurrence that would have fundamentally transformed the court's mootness analysis.

opted in to the collective action is in fact similarly situated to the named plaintiff. *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1261 (11th Cir. 2008). "This second stage is less lenient, and the plaintiff bears a heavier burden." *Id.* Should the plaintiff satisfy her burden at this stage, the case may proceed to trial as a collective action.[6]

Absent from the text of the FLSA is the concept of "class certification." As the Eighth Circuit has noted, however, "[m]any courts and commentators . . . have used the vernacular of the Rule 23 class action for simplification and ease of understanding when discussing representative cases brought pursuant to

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[6] Because only the notice stage is implicated in this appeal, we need not directly address the level of proof required to satisfy the similarly situated requirement at the post-discovery stage. Although this standard must necessarily be more rigorous than the standard applicable at the notice stage, the fact-specific, flexible nature of this approach affords district judges latitude in exercising their discretion. *See* 45C Am. Jur. 2d *Job Discrimination* § 2184 (2011) (listing fourteen factors courts may consider at the post-discovery stage). As we have explained:

> A representative (but not exhaustive or mandatory) list of relevant factors [at this stage] includes whether the plaintiffs are employed in the same corporate department, division and location; advanced similar claims of . . . discrimination; sought substantially the same form of relief; and had similar salaries and circumstances of employment. Plaintiffs may also be found dissimilar on the basis of case management issues, including individualized defenses.

Ruehl v. Viacom, Inc., 500 F.3d 375, 389 n.17 (3d Cir. 2007) (citations omitted).

§ 16(b) of the FLSA." *Kelley v. Alamo*, 964 F.2d 747, 748 n.1 (8th Cir. 1992). As a result, courts commonly refer to a plaintiff's satisfaction of her burden at the notice stage as resulting in "conditional certification," *see, e.g., Ruehl v. Viacom, Inc.*, 500 F.3d 375, 389 n.17 (3d Cir. 2007), or "provisional certification," *see, e.g., Nash v. CVS Caremark Corp.*, 683 F. Supp. 2d 195, 199 (D.R.I. 2010). Similarly, the court's second-step analysis is traditionally triggered by a defendant's motion to "decertify the class" on the ground that its proposed members are not similarly situated. *See, e.g., Lusardi v. Xerox Corp.*, 975 F.2d 964, 967 (3d Cir. 1992). And, in the same fashion, a named plaintiff becomes a "class representative," *see, e.g., id.* at 966, his attorney becomes "class counsel," *see, e.g., Harkins v. Riverboat Servs., Inc.*, 385 F.3d 1099, 1101 (7th Cir. 2004), and similarly situated employees become "potential class members," *see, e.g., In re Family Dollar FLSA Litig.*, 637 F.3d 508, 518 (4th Cir. 2011).

Despite this judicial gloss on § 216(b), "the 'certification' we refer to here is only the district court's exercise of [its] discretionary power, upheld in *Hoffmann-La Roche*, to facilitate the sending of notice to potential class members," and "is neither necessary nor sufficient for the existence of a representative action under FLSA." *Myers v. Hertz Corp.*, 624 F.3d 537, 555 n.10 (2d Cir. 2010); *see also Morgan*, 551 F.3d at 1261 n.40 ("District courts following the two-step . . . approach should treat the initial decision to certify and the decision to notify potential collective

action members as synonymous.").[7] Defendants here rely heavily on the superficiality of the similarities between the "certification" processes inherent in Rule 23 class actions and § 216(b) collective actions in arguing Symczyk could not purport to "represent" the interests of similarly situated employees before anyone had opted in to the action. And, as noted, expedient adoption of Rule 23 terminology with no mooring in the statutory text of § 216(b) may have injected a measure of confusion into the wider body of FLSA jurisprudence. Although "conditional certification" may not vest a § 216(b) "class" with the independent legal status that certification provides a Rule 23 class, *see Trotter v. Klincar,* 748 F.2d 1177, 1183 (7th Cir. 1984), this realization does not control our mootness analysis in the manner suggested by defendants. Provision of notice does not transform an FLSA suit into a "representative action," but, as we will explain, its central place within the litigation scheme approved of by the Supreme Court in *Hoffmann-La*

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[7] In *Hoffmann-La Roche,* the Supreme Court recognized the efficacy of § 216(b) hinges on "employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." 493 U.S. at 170. To ensure this task "is accomplished in an efficient and proper way," the Court interpreted § 216(b) as endowing district courts with "the requisite procedural authority to manage the process of joining multiple parties in a manner that is orderly, sensible, and not otherwise contrary to statutory commands or the Federal Rules of Civil Procedure." *Id.* at 170-71.

Roche necessarily shapes our approach to squaring Rule 68 and § 216(b).

B.

Article III of the United States Constitution limits the jurisdiction of the federal courts to "actual 'Cases' and 'Controversies.'" *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 298 (2008) (Roberts, C.J., dissenting). "When the issues presented in a case are no longer 'live' or the parties lack a legally cognizable interest in the outcome, the case becomes moot and the court no longer has subject matter jurisdiction." *Weiss v. Regal Collections*, 385 F.3d 337, 340 (3d Cir. 2004). "An offer of complete relief will generally moot the plaintiff's claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation." *Id.* Thus, whether or not the plaintiff accepts the offer, no justiciable controversy remains when a defendant tenders an offer of judgment under Rule 68 encompassing all the relief a plaintiff could potentially recover at trial. *See Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991). We have recognized, however, that conventional mootness principles do not fit neatly within the representative action paradigm. *Cf. Lusardi*, 975 F.2d at 974 ("[S]pecial mootness rules apply in the class action context, where the named plaintiff purports to represent an interest that extends beyond his own.").

Rule 68 was designed "to encourage settlement and avoid litigation." *Marek v. Chesny*, 473 U.S. 1, 5

(1985). In the representative action arena, however, Rule 68 can be manipulated to frustrate rather than to serve these salutary ends. Exploring this deviation from Rule 68's purposes, the Supreme Court has noted:

> Requiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement.

Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980); *see also Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1050 (5th Cir. Unit A July 1981) ("By tendering to the named plaintiffs the full amount of their personal claims each time suit is brought as a class action, the defendants can in each successive case moot the named plaintiffs' claims before a decision on certification is reached.").

We addressed the tension between Rules 23 and 68 in *Weiss*. There, the named plaintiff filed a federal class action complaint alleging violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, and, prior to moving for class certification, received a Rule 68 offer of judgment in full satisfaction of the individual relief sought. The plaintiff rejected the offer, and the court granted the defendants' 12(b)(1) motion to dismiss the complaint on mootness grounds. On

appeal, we explored the applicability of the "relation back" doctrine to a scenario in which the defendants' "tactic of 'picking off' lead plaintiffs with a Rule 68 offer . . . may deprive a representative plaintiff the opportunity to timely bring a class certification motion, and also may deny the court a reasonable opportunity to rule on the motion." 385 F.3d at 347. Finding application of the doctrine necessary to vindicate the policy aims inherent in Rule 23, we held that, "[a]bsent undue delay in filing a motion for class certification . . . where a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint." *Id.* at 348. As there had been no undue delay, we reversed and directed the district court to allow the plaintiff to file a class certification motion that would "relate back" to the filing of the complaint. *Id.*[8]

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[8] In *Weiss*, we noted that our opinion might be viewed as creating tension with *Lusardi*, which involved alleged violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* Section 7(b) of the ADEA incorporates § 216(b) by reference. *See* 29 U.S.C. § 626(b). However, in distinguishing *Lusardi*, we did not rely on the differences between the procedures applicable to Rule 23 and § 216(b) actions. *See Weiss*, 385 F.3d at 348-49. Instead, we explained that *Lusardi*, unlike *Weiss*, involved a voluntary settlement entered into by the named plaintiffs rather than "an offer of judgment made in response to the filing of a complaint." *Id.* at 349. We wrote:

> In this appeal, the 'picking off' scenarios described by the Supreme Court in *Roper* are directly implicated.

(Continued on following page)

In essence, the relation back doctrine allows a district court to retain jurisdiction over a matter that would appear susceptible to dismissal on mootness grounds by virtue of the expiration of a named plaintiff's individual claims. In *Sosna v. Iowa,* 419 U.S. 393, 401 (1975), the Supreme Court found federal court jurisdiction to adjudicate a live controversy between members of a certified Rule 23 class and a named defendant was not extinguished by the named plaintiff's claim becoming moot before the district court reached the merits of the case. Addressing the possibility that resolution of the controversy as to the named plaintiffs may occur "before the district court can reasonably be expected to rule on a certification motion," the Court explained such certification "can be said to 'relate back' to the filing of the complaint" when the issue might otherwise evade review. *Id.* at 402 n.11; *see also U.S. Parole Comm'n v. Geraghty,* 445 U.S. 388, 399 (1980) (preserving an Article III court's authority to review class certification issues when a named plaintiff's claims are "so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification

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> In *Lusardi* they were not. . . . In *Lusardi,* no unilateral action by the Defendant rendered the plaintiffs' claims 'inherently transitory.' Defendants here used the Rule 68 offer to thwart the putative class action before the certification question could be decided.

Id. These considerations are not unique to the Rule 23 context, and *Weiss* did not turn on the disparity between opt-in and opt-out actions.

before the proposed representative's individual interest expires").

This equitable principle has evolved to account for calculated attempts by some defendants to short-circuit the class action process and to prevent a putative representative from reaching the certification stage. Certification vests a named plaintiff with a procedural right to act on behalf of the collective interests of the class that exists independent of his substantive claims. *See Sosna,* 419 U.S. at 399 (explaining that, once a class has been certified, the mooting of a class representative's individual claims does not invariably result in the mooting of the entire action because "the class of unnamed persons described in the certification acquire[s] a legal status separate from the interest asserted by [the named plaintiff]"). Although traditional mootness rules would ordinarily apply absent an affirmative ruling on class certification, "in certain circumstances, to give effect to the purposes of Rule 23, it is necessary to conceive of the named plaintiff as a part of an indivisible class and not merely a single adverse party even before the class certification question has been decided." *Weiss,* 385 F.3d at 347. The rationale underpinning the relation back doctrine serves to shield from dismissal on mootness grounds those claims vulnerable to being "picked off" by defendants attempting to forestall class formation. As the Seventh Circuit has explained:

> Normally, . . . a class action must be certified as such in order for it to escape dismissal

> once the claims of the named plaintiff become moot. But the courts have recognized that an absolute requirement would prevent some otherwise justiciable claims from ever being subject to judicial review. . . . [J]ust as necessity required the development of the relation back doctrine in cases where the underlying factual situation naturally changes so rapidly that the courts cannot keep up, so necessity compels a similar result here. If the class action device is to work, the courts must have a reasonable opportunity to consider and decide a motion for certification. If a tender made to the individual plaintiff while the motion for certification is pending could prevent the courts from ever reaching the class action issues, that opportunity is at the mercy of a defendant, even in cases where a class action would be most clearly appropriate.

Susman v. Lincoln Am. Corp., 587 F.2d 866, 870 (7th Cir. 1978) (citations omitted).

When a defendant's Rule 68 offer threatens to preempt the certification process, reconciling the conflicting imperatives of Rules 23 and 68 requires allocating sufficient time for the process to "play out." *Weiss*, 385 F.3d at 348. By invoking the relation back doctrine, a court preserves its authority to rule on a named plaintiff's attempt to represent a class by treating a Rule 23 motion as though it had been filed contemporaneously with the filing of the class complaint. Consequently, "the 'relation back' principle ensures that plaintiffs can reach the certification stage."

Sandoz v. Cingular Wireless LLC, 553 F.3d 913, 919 (5th Cir. 2008).

III.

A.

The issue we must resolve on this appeal, then, is whether an FLSA collective action becomes moot when (1) the putative representative receives a Rule 68 offer in full satisfaction of her individual claim prior to moving for "conditional certification," and (2) no other potential plaintiff has opted in to the suit.[9] Animating our decision in *Weiss* was the ability of defendants to use Rule 68 "to thwart the putative class action before the certification question could be decided." 385 F.3d at 349. Symczyk cites similar arguments in the § 216(b) context and discerns no material distinction between the two procedures insofar

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[9] Relying on a careful analysis of various district court efforts to grapple with the interplay of Rule 68 and § 216(b) provided in *Briggs v. Arthur T. Mott Real Estate LLC,* No. 06-0468, 2006 U.S. Dist. LEXIS 82891 (E.D.N.Y. Nov. 14, 2006), the District Court concluded Symczyk's case was distinguishable from those in which courts declined to dismiss complaints following Rule 68 offers because, in those, "other individuals had already opted in to join the collective action, it was unclear whether the Rule 68 offer fully satisfied the plaintiff's claims, or the plaintiff had already filed a motion for conditional certification under § 216(b)." *Symczyk,* 2010 U.S. Dist. LEXIS 49599, at *13 (footnotes omitted). Here, Symczyk did not dispute the adequacy of the offer as it pertained to the value of her individual claim. However, as we will explain, we believe treating the other two conditions as dispositive would be imprudent.

as this consideration is concerned. By contrast, defendants contend *Weiss* does not apply in the FLSA context because a putative § 216(b) named plaintiff allegedly lacks the "representative" status that accords a Rule 23 named plaintiff a personal stake in the matter sufficient to confer continued Article III jurisdiction once his individual claim has been mooted. We believe the considerations warranting application of the relation back doctrine to Rule 23 class actions also apply to § 216(b) collective actions.

In support of their effort to confine *Weiss* to the class action setting, defendants rely principally on the dissimilar roles played by Rule 23 and § 216(b) named plaintiffs. As noted, the statutory form of aggregation provided for in the FLSA requires each party plaintiff affirmatively to opt in to a collective action by filing a consent form "in the court in which such action is brought." 29 U.S.C. § 216(b). Whereas a member of a certified class in a Rule 23(b)(3) proceeding will be bound by judgment unless he has intentionally opted out of the suit, resolution of a § 216(b) collective action will not bind any similarly situated employee absent his express, written consent. *See id.*; *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975).[10] Defendants argue a § 216(b) named plaintiff whose individual claim has been mooted by a

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[10] Of course, class actions certified under Rule 23(b)(1) or (b)(2) are "mandatory" class actions in that class members are not permitted to opt out. *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541, 2558 (2011).

Rule 68 offer before anyone has opted in to the action cannot purport to possess a personal stake in representing the interests of others.[11]

Although defendants' logic has some surface appeal, reliance on the watershed event of an opt-in to trigger application of the special mootness rules that prevail in the representative action context incentivizes the undesirable strategic use of Rule 68

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[11] As noted, the Portal-to-Portal Act notionally abolished "representative actions." *See* Pub. L. No. 80-49, § 5(a), 61 Stat. 84, 87 (1947). This amendment, however, did not strip an employee – such as Symczyk – of her right to act on behalf of similarly situated co-workers. Rather, the 1947 amendment eliminated the so-called "agency suit," divesting nonparty representatives of standing to initiate actions under § 216(b). *See id.* "By identifying 'employees' as the only proper parties in a § 216(b) action, the Portal to Portal Act aimed to ban representative actions that previously had been brought by unions on behalf of employees." *Cameron-Grant v. Maxim Healthcare Servs.*, 347 F.3d 1240, 1248 (11th Cir. 2003); *see also Arrington v. Nat'l Broad. Co.*, 531 F. Supp. 498, 502 (D.D.C. 1982) (explaining Congress amended the FLSA "to eradicate the problem of totally uninvolved employees gaining recovery as a result of some third party's action in filing suit"). The FLSA does not prevent an employee, serving as lead plaintiff, from fulfilling a representative role. When defendants made their Rule 68 offer of judgment, Symczyk represented only her own interests, and defendants' potential liability consisted entirely of the individual damages sought by Symczyk as named plaintiff. That Symczyk had yet to assume a representative role vis-à-vis the allegedly similarly situated employees listed in her complaint stemmed not from some purported statutory prohibition but instead from defendants' successful attempt to pick her off before the court had occasion to consider the suitability of allowing the claims to be litigated collectively with Symczyk as lead plaintiff.

that prompted our holding in *Weiss*.[12] As the Supreme Court explained in *Hoffmann-La Roche*, actualization of § 216(b)'s purposes often necessitates a district court's engagement at the notice phase of the proceeding. 493 U.S. at 170-71; *see also Morgan*, 551 F.3d at 1259 ("[T]he importance of certification, at the initial stage, is that it authorizes either the parties, or the court itself, to facilitate notice of the action to similarly situated employees."). When a defendant's Rule 68 offer arrives before the court has had an opportunity to determine whether a named plaintiff has satisfied his burden at this threshold stage, and the court has therefore refrained from overseeing the provision of notice to potential party plaintiffs, it is not surprising to find the offer has also preceded the arrival of any consent forms from prospective opt-ins. If our mootness inquiry in the § 216(b) context were predicated inflexibly on whether any employee has opted in to an action at the moment a named plaintiff

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[12] In both *Susman* and *Zeidman*, the relation back rationale was deployed to salvage a court's jurisdiction over class complaints when the named plaintiffs' claims had ostensibly been mooted while their motions for class certification were pending. However, because "the federal rules do not require certification motions to be filed with the class complaint, nor do they require or encourage premature certification determinations," we explained in *Weiss* that "reference to the bright line event of the filing of the class certification motion may not always be well-founded." 385 F.3d at 347. Consequently, we extended the doctrine to instances in which the plaintiff moved for class certification subsequent to receipt of a Rule 68 offer so long as he did so without "undue delay." *Id.* at 348.

receives a Rule 68 offer, employers would have little difficulty preventing FLSA plaintiffs from attaining the "representative" status necessary to render an action justiciable notwithstanding the mooting of their individual claims.

In *Sandoz,* the only court of appeals' decision to address the applicability of the relation back doctrine in the FLSA context, the Fifth Circuit concluded Congress did not intend, through the enactment of § 216(b), to create an "anomaly" by allowing employers "to use Rule 68 as a sword, 'picking off' representative plaintiffs and avoiding ever having to face a collective action." 553 F.3d at 919. The court elaborated:

> [T]he differences between class actions and FLSA § 216(b) collective actions do not compel a different result regarding whether a certification motion can "relate back" to the filing of the complaint. The status of a case as being an "opt in" or "opt out" class action has no bearing on whether a defendant can unilaterally moot a plaintiff's case through a Rule 68 offer of judgment. Although the differences between Rule 23 class actions and FLSA § 216(b) collective actions alter the conceptual mootness inquiry, each type of action would be rendered a nullity if defendants could simply moot the claims as soon as the representative plaintiff files suit. Thus, the policies behind applying the "relation back" principle for Rule 23 class actions

> apply with equal force to FLSA § 216(b) collective actions.

Id. at 920 (citations omitted). There, the defendant tendered its offer of judgment approximately one month after Sandoz had commenced her FLSA action, and Sandoz waited thirteen months after filing her complaint to move for "conditional certification." *Id.* at 921. Borrowing language from *Weiss* and holding that "relation back is warranted only when the plaintiff files for certification without undue delay,'" *id.* (quoting *Weiss,* 385 F.3d at 348), the Fifth Circuit remanded for the district court to consider whether Sandoz had "timely sought certification of her collective action," *id.*

B.

Although the opt-in mechanism transforms the manner in which a named plaintiff acquires a personal stake in representing the interests of others, it does not present a compelling justification for limiting the relation back doctrine to the Rule 23 setting. The considerations that caution against allowing a defendant's use of Rule 68 to impede the advancement of a representative action are equally weighty in either context. Rule 23 permits plaintiffs "to pool claims which would be uneconomical to litigate individually." *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 809 (1985). Similarly, § 216(b) affords plaintiffs "the advantage of lower individual costs to vindicate rights by the pooling of resources." *Hoffmann-La*

Roche, 493 U.S. at 170. Rule 23 promotes "efficiency and economy of litigation." *Crown, Cork & Seal Co. v. Parker,* 462 U.S. 345, 349 (1983). Similarly, "Congress' purpose in authorizing § 216(b) class actions was to avoid multiple lawsuits where numerous employees have allegedly been harmed by a claimed violation or violations of the FLSA by a particular employer." *Prickett v. DeKalb Cnty.,* 349 F.3d 1294, 1297 (11th Cir. 2003).

When Rule 68 morphs into a tool for the strategic curtailment of representative actions, it facilitates an outcome antithetical to the purposes behind § 216(b). Symczyk's claim – like that of the plaintiff in *Weiss* – was "acutely susceptible to mootness" while the action was in its early stages and the court had yet to determine whether to facilitate notice to prospective plaintiffs. *See Weiss,* 385 F.3d at 347 (internal quotation marks omitted). When the certification process has yet to unfold, application of the relation back doctrine prevents defendants from using Rule 68 to "undercut the viability" of either type of representative action. *See id.* at 344.

C.

Additionally, the relation back doctrine helps safeguard against the erosion of FLSA claims by operation of the Act's statute of limitations. To qualify for relief under the FLSA, a party plaintiff must "commence" his cause of action before the statute of limitations applying to his individual claim has

lapsed. *Sperling v. Hoffmann-La Roche, Inc.*, 24 F.3d 463, 469 (3d Cir. 1994).[13] For a named plaintiff, the action commences on the date the complaint is filed. 29 U.S.C. § 256(a). For an opt-in plaintiff, however, the action commences only upon filing of a written consent. *Id.* § 256(b). This represents a departure from Rule 23, in which the filing of a complaint tolls the statute of limitations "as to all asserted members of the class" even if the putative class member is not cognizant of the suit's existence. *See Crown, Cork & Seal Co.*, 462 U.S. at 350 (internal quotation marks omitted). Protracted disputes over the propriety of dismissal in light of Rule 68 offers may deprive potential opt-ins whose claims are in jeopardy of expiring of the opportunity to toll the limitations period – and preserve their entitlements to recovery – by filing consents within the prescribed window.[14]

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[13] Plaintiffs seeking recovery under the FLSA must commence an action within two years of the alleged violation (or within three years if the violation is "willful"). 29 U.S.C. § 255(a).

[14] Defendants contend a party plaintiff's cause of action vests at the moment he files his consent form and that no conception of the relation back doctrine would permit this statutorily mandated act of opting in to relate back to the filing of the collective action complaint. While perhaps true, this assertion is beside the point. For the sake of argument, consider a hypothetical co-worker of Symczyk's who was subjected to a willful FLSA violation and whose tenure with the company also ended in December 2007. Because Symczyk's complaint was dismissed before this (or any) employee had opted in to the action, this potential plaintiff forfeited any claim to relief in December 2010. The relation back doctrine cannot, at this juncture, redeem this

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D.

In sum, we believe the relation back doctrine helps ensure the use of Rule 68 does not prevent a collective action from playing out according to the directives of § 216(b) and the procedures authorized by the Supreme Court in *Hoffmann-La Roche* and further refined by courts applying this statute. Depriving the parties and the court of a reasonable opportunity to deliberate on the merits of collective action "conditional certification" frustrates the objectives served by § 216(b). *Cf. Sandoz,* 553 F.3d at 921 (explaining "there must be some time for a[n FLSA] plaintiff to move to certify a collective action before a defendant can moot the claim through an offer of judgment"). Absent undue delay, when an FLSA plaintiff moves for "certification" of a collective action, the appropriate course – particularly when a defendant makes a Rule 68 offer to the plaintiff that would have the possible effect of mooting the claim for collective relief asserted under § 216(b) – is for the district court to relate the motion back to the filing of the initial complaint.

Upon remand, should Symczyk move for "conditional certification," the court shall consider whether such motion was made without undue delay, and, if it

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would-be plaintiff's cause of action. However, had Symczyk been permitted to move – in timely fashion – for "conditional certification" in light of defendants' March 2010 motion to dismiss, this plaintiff may have received notice of the ongoing collective action prior to her claim growing stale.

so finds, shall relate the motion back to December 4, 2009 – the date on which Symczyk filed her initial complaint. If (1) Symczyk may yet timely seek "conditional certification" of her collective action, (2) the court permits the case to move forward as a collective action (by virtue of Symczyk's satisfaction of the "modest factual showing" standard), and (3) at least one other similarly situated employee opts in, then defendants' Rule 68 offer of judgment would no longer fully satisfy the claims of everyone in the collective action, and the proffered rationale behind dismissing the complaint on jurisdictional grounds would no longer be applicable. If, however, the court finds Symczyk's motion to certify would be untimely, or otherwise denies the motion on its merits, then defendants' Rule 68 offer to Symczyk – in full satisfaction of her individual claim – would moot the action.

IV.

For the foregoing reasons, we will reverse the judgment of the District Court and remand for proceedings consistent with this opinion.

LAURA SYMCZYK,
Plaintiff,
v.
GENESIS HEALTHCARE CORPORATION and ELDERCARE RESOURCES CORPORATION,
Defendants.

CIVIL ACTION NO. 09-5782.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2010 U.S. Dist. LEXIS 49599

May 19, 2010, Decided
May 19, 2010, Filed

COUNSEL: For LAURA SYMMCZYK, an individual, on behalf of herself and others similarly situated, Plaintiff: GARY F. LYNCH, LEAD ATTORNEY, CARLSON LYNCH LTD, NEW CASTLE, PA; GERALD D. WELLS, III, LEAD ATTORNEY, FARUQI & FARUQI LLP, HUNTINGDON VLY, PA; TREVAN P. BORUM, LEAD ATTORNEY, PHILADELPHIA, PA.

For GENESIS HEALTHCARE CORPORATION, ELDERCARE RESOURCES CORPORATION, doing business as GENESIS ELDERCARE, Defendants: JAMES N. BOUDREAU, LEAD ATTORNEY, CHRISTINA TELLADO-WINSTON, GREENBERG TRAURIG LLP, PHILADELPHIA, PA; MICHELE HALGAS MALLOY, LITTLER MENDELSON PC, PHILADELPHIA, PA.

JUDGES: Michael M. Baylson, U.S.D.J.

OPINION BY: Michael M. Baylson

OPINION

MEMORANDUM RE: MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Baylson, J.

In this action, Plaintiff Laura Symczyk alleges that Defendants Genesis HealthCare Corporation and ElderCare Resources Corporation (collectively, "Defendants") violated the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. ("FLSA"), and Pennsylvania law, by implementing an automatic meal break deduction policy. (Compl. ¶ 1, Docket No. 1.) Symczyk brought the action as a collective action under 29 U.S.C. § 261(b), on behalf of herself and similarly situated individuals. Presently before the Court is Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction (Docket No. 12), pursuant to Federal Rule of Civil Procedure 12(b)(1). The pending Motion seeks dismissal based on Defendants' offer of judgment, which, according to Defendant, exceeds all damages Symczyk can recover under the FLSA, in accordance with Federal Rule of Civil Procedure 68 ("Rule 68").

I. *Factual and Procedural Background*

Symczyk worked as a Registered Nurse at Pennypack Center, and was an employee of Defendants from April 2007 to December 2007. Symcyzk commenced this FLSA collective action on December 4, 2009, which identified the class as comprising "all

non-exempt employees of Defendants whose pay is subject to an automatic meal break deduction even when they perform compensable work during their meal breaks." (Compl. ¶ 14, Docket No. 1.)[1]

On February 18, 2010, Defendants filed an Answer to the Complaint. (Docket No. 8.) The same day, Defendants served Symczyk's counsel with an offer of judgment, pursuant to Rule 68, in the amount of "$7,500.00 in alleged unpaid wages, plus attorneys' fees, costs and expenses as determined by the Court." (Mot. to Dismiss, Ex. A, at 2.) Defendants contend, and Symczyk does not contest, that Symczyk "never responded, effectively rejecting the Offer." (Mot. to Dismiss 2; *see also* Resp. (Docket No. 19).)

On March 11, 2010, this Court entered an Order providing for "an initial ninety-day period of discovery, at the close of which [Symczyk] will move for

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[1] The Complaint further provides,

> These persons include, but are not limited to, secretaries, housekeepers, custodians, clerks, porters, registered nurses, licensed practical nurses, nurses' aides, administrative assistants, anesthetists, clinicians, medical coders, medical underwriters, nurse case managers, nurse interns, nurse practitioners, practice supervisors, professional staff nurses, quality coordinators, resource pool nurses, respiratory therapists, senior research associates, operating room coordinators, surgical specialists, admissions officers, student nurse technicians, trainers, and transcriptionists employed at any of Defendants' facilities during the three years preceding the filing of this action.

(Compl. ¶ 14.)

conditional certification under § 216(b) of the FLSA." (Docket No. 10, ¶1.) On March 23, 2010, Defendants filed the pending Motion to Dismiss for Lack of Subject Matter Jurisdiction. Subsequently, on April 23, 2010, Symczyk filed an Amended Class/Collective Action Complaint (Docket No. 22), which differed from the Complaint by adding allegations pursuant to Federal Rule of Civil Procedure 23 on behalf of a class seeking relief under Pennsylvania state law. Symczyk's Amended Complaint provides the same definition of the class as the Complaint (Am. Compl. ¶ 20).

II. *The Parties' Contentions*

Defendants' Motion to Dismiss is based upon their Rule 68 offer of judgment. In support of their Motion, Defendants assert that they offered Symczyk "compensation that is equal to or greater than the potential relief she could obtain at trial." (Mot. to Dismiss 5.) According to Defendants, "a defendant's offer to pay the full amount of the plaintiff's potential recovery . . . renders the plaintiff's claim moot because she loses a legally cognizable interest in the outcome of the litigation," thereby rendering this case subject to dismissal. (Mot. to Dismiss 3.)

In response, Symczyk contends that courts "heavily disfavor[ ]" "Defendants' strategic attempt to 'pick-off' the Plaintiff before the Court can meaningfully consider and decide the [§] 216(b) motion." (Resp. 1.) Symczyk argues that "the Third Circuit has considered and rejected the use of such tactic in the

context of other representative actions, in particular a Rule 23 class action," and that courts have recognized that there is no distinction between Rule 23 and § 216(b) cases for purposes of "strategic mooting by defendants through the use of a Rule 68 offer of judgment." (Resp. 7.) Symczyk thereby concludes that the Court, rather than dismissing the action as moot, should permit Symyczk to "file a class certification motion, and that motion would 'relate back' to the filing of the complaint, thereby eliminating any concerns that the representative plaintiff lack[s] standing to sue." (Resp. 4-5.)

Defendants reply that dismissal is appropriate even though "this case is an opt-in collective action under § 216(b)," because "the opt-in procedure under § 216(b) is fundamentally different from the opt-out procedure in Rule 23 class actions," and both the "plain language of the FLSA and its legislative history," as well as "the great weight of authority" indicate that Defendants' Offer moots Symczyk's claim. (Mot. to Dismiss 7; *see also* Reply 2-13 (Docket No. 24).)

III. *Discussion*

Symczyk does not take issue with Defendants' assertion that the damages offered exceed any amount of unpaid wages sought; thus, the only legal question the Court must address is whether the rejected Rule 68 offer renders this case moot and divests this Court of subject matter jurisdiction over the action.

For a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), the plaintiff bears the burden of persuading the Court that subject matter jurisdiction exists. *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991). The Court "may not presume the truthfulness of [P]laintiff's allegations, but rather, must evaluate for itself the merits of the jurisdictional claims." *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005) (internal quotation marks and alterations omitted).

Article III of the United States Constitution limits the jurisdiction of federal courts to "actual cases and controversies." U.S. Const. art. III, § 2. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *L.A. County v. Davis*, 440 U.S. 623, 631 (1979) (internal quotation marks omitted). Many Courts, including the Third Circuit, have held that an offer of settlement under Rule 68, if undoubtedly sufficient to compensate the plaintiff for all damages, will result in dismissal for lack of jurisdiction, regardless of whether the offer is accepted. "An offer of complete relief will generally moot the plaintiff's claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation." *Weiss v. Regal Collections*, 385 F.3d 337, 340 (3d Cir. 2004).[2] In cases

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[2] *See also Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991) ("Once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate and a plaintiff

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in which the mootness doctrine applies, subject matter jurisdiction no longer exists and the case is properly dismissed. *See L.A. County,* 440 U.S. at 631.

As both parties recognize, neither the Supreme Court nor the Third Circuit has addressed the specific question presented by Defendants' Motion to Dismiss, of whether a Rule 68 offer of judgment made to the named plaintiff in a FLSA action moots the collective action claims. (Resp. 5; Reply 2.) Instead, the Third Circuit held in *Weiss*, a class action commenced pursuant to Federal Rule of Civil Procedure 23 ("Rule 23"), that when the defendants "use[ ] the Rule 68 offer to thwart the putative class action before the certification question could be decided," the class action is not mooted, the plaintiff should be permitted to file the certification motion, and "the appropriate course is to relate the certification motion back to the filing of the class complaint." 385 F.3d at 348-49. It is not implausible that Symczyk filed the Amended Complaint, which added allegations of a class seeking relief under Pennsylvania Law, but pursuant to Rule 23, to come under the *Weiss* holding.

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who refuses to acknowledge this loses outright, under Fed. R. Civ. P. 12(b)(1), because he has no remaining stake." (internal citations omitted)); 13A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Jurisdiction 2d § 3533.2, at 236 (2d ed. 1984) ("Even when one party wishes to persist to judgment, an offer to accord all of the relief demanded may moot the case.").

Although the Third Circuit has not determined whether *Weiss's* "relation back" doctrine applies to FLSA collective actions, numerous other courts have addressed the issue. Symczyk points the Court to a Fifth Circuit decision as well as multiple district court cases from the Second Circuit, which held that Rule 68 Offers of Judgment do not moot the underlying FLSA collective actions.[3]

In 1980, the Supreme Court explained that allowing a defendant to use a Rule 68 offer of judgment to "pick-off" an individual claimant in a Rule 23 class action "before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement."

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[3] *See Sandoz v. Cingular Wireless, LLC*, 553 F.3d 913, 920 (5th Cir. 2008); *Nash v. CVS Caremark Corp.*, No. 09-0079, 683 F. Supp. 2d 195, 2010 U.S. Dist. LEXIS 50831; 2010 WL 446178, at *1-3 (D.R.I. Feb. 9, 2010); *Bah v. Shoe Mania, Inc.*, No. 08-9380, 2009 U.S. Dist. LEXIS 40803; 2009 WL 1357223 (S.D.N.Y. May 13, 2009); *Bowens v. Atl. Maint. Corp.*, 546 F. Supp. 2d 55, 58 (E.D.N.Y. 2008); *Yeboah v. Cent. Parking Sys.*, No. 06-0128, 2007 U.S. Dist. LEXIS 81256, 2007 WL 3232509, at *3-6 (E.D.N.Y. Nov. 1, 2007); *Rubery v. Buth-Na-Bodhaige, Inc.*, 494 F. Supp. 2d 178, 181 (W.D.N.Y. 2007); *Roble v. Celestica Corp.*, 627 F. Supp. 2d 1008, 1013 (D. Minn. 2007); *Guerra v. Big Johnson Concrete Pumping, Inc.*, No. 05-1427, 2006 U.S. Dist. LEXIS 58973, 2006 WL 2290517, at *2-3 (S.D. Fla. June 16, 2006); *Geer v. Challenge Fin. Investors Corp.*, No. 05-1109, 2006 U.S. Dist. LEXIS 10903, 2006 WL 704933, at *3 (D. Kan. Mar. 14, 2006); *Reyes v. Carnival Corp.*, No. 04-21861, 2005 U.S. Dist. LEXIS 11948, 2005 WL 4891058, at *3 (S.D. Fla. May 25, 2005).

Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 339, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980). In light of this concern, the Fifth Circuit applied the "relation back" doctrine articulated in *Weiss* to the FLSA collective action at issue, reasoning as follows:

> The status of a case as being an "opt in" or "opt out" class action has no bearing on whether a defendant can unilaterally moot a plaintiff's case through a Rule 68 offer of judgment. Although the differences between Rule 23 class actions and FLSA § 216(b) collective actions alter the conceptual mootness inquiry, each type of action would be rendered a nullity if defendants could simply moot the claims as soon as the representative plaintiff files suit. Thus, the policies behind applying the "relation back" principle for Rule 23 class actions apply with equal force to FLSA § 216(b) collective actions.

Sandoz v. Cingular Wireless, LLC, 553 F.3d 913, 920 (5th Cir. 2008).

The opposite conclusion, however, has been reached by numerous other district courts[4] in the

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[4] Defendants also point out that the Eleventh Circuit similarly concluded that an action was moot because "[i]n contrast to the Rule 23 plaintiff, [the] § 216(b) plaintiff [in the case] has no claim that he is entitled to represent other plaintiffs." *Cameron-Grant v. Maxim Health Care Servs., Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003) (per curiam). *Cameron-Grant* is distinguishable from the present case, however, because the plaintiff

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Second Circuit.[5] For example, in *Darboe v. Goodwill Industries of Greater New York & Northern New Jersey, Inc.*, 485 F. Supp. 2d 221 (E.D.N.Y. 2007), the District Court for the Eastern District of New York took care to distinguish *Weiss* from FLSA collective actions on the basis that, in contrast to a Rule 23 action where "once a class is certified, all those falling within the description of the class certified are deemed a part of the case and will be bound by the outcome unless they take the affirmative action of opting out of the matter," members of a FLSA class must take the "affirmative step of 'opting in' to the action to be a part of the action and bound by its terms." *Id.* at 223-24. The *Darboe* court reasoned that this distinction indicated that under the FLSA, "the named plaintiff is deemed to represent himself only," and thus, "application of Rule 68 to moot a single plaintiff's claim creates no conflict with the policy

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who contended that the action was not mooted by a Rule 68 offer from the defendant, previously stipulated to dismiss his claims in their entirety, and thus, had voluntarily dismissed his claims. *See id.* at 1244.

[5] *Louisdo v. Am. Telecomms., Inc.*, 540 F. Supp. 2d 368, 373-73 (E.D.N.Y. 2008); *Darboe v. Goodwill Indus. of Greater N.Y. & N. N.J., Inc.*, 485 F. Supp. 2d 221 (E.D.N.Y. 2007); *Briggs v. Arthur T. Mott Real Estate LLC*, No. 06-0468, 2006 U.S. Dist. LEXIS 82891, 2006 WL 3314624, at *4 (E.D.N.Y. Nov. 14, 2006); *Ward v. Bank of N.Y.*, 455 F. Supp. 2d 262, 268-70 (S.D.N.Y. 2006); *Vogel v. Am. Kiosk Mgmt.*, 371 F. Supp. 2d 122, 127-28 (D. Conn. 2005); *Thomas v. Interland, Inc.*, No. 02-3175, 2003 U. S. Dist. LEXIS 27664, 2003 WL 24065651, at *3-4 (N.D. Ga. Aug. 25, 2003); *Mackenzie v. Kindred Hosps. E., L.L.C.*, 276 F. Supp. 2d. 1211, 1219 (M.D. Fla. 2003).

underlying the collective action procedure." *Id.* at 224.

In *Briggs v. Arthur T. Mott Real Estate LLC*, the district court for the Eastern District of New York reconciled the contrary conclusions reached by various courts, by explaining that "courts have held that a Rule 68 offer of judgment moots an FLSA collective action," in cases in which (1) "no other similarly situated individuals have opted in," and (2) "the offer of judgment satisfies all damages of the plaintiff, plus all costs and attorney's fees." 2006 U.S. Dist. LEXIS 82891, 2006 WL 3314624, at *2. Indeed, all of the district court cases[6] cited by Symczyk declined to dismiss a FLSA collective action because other individuals had already opted in to join the collective

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[6] The only other case cited by Symczyk, *Sandoz*, a Fifth Circuit decision, did not involve any of the factors articulated above. Instead, the Fifth Circuit recognized that "in theory a Rule 68 offer of judgment could moot a FLSA collective action," and declined to apply the "relation back" doctrine to the case at hand. 555 F.3d 921-922. The *Sandoz* court clarified that "relation back is warranted only when the plaintiff files for certification without undue delay." *Id.* at 921. Because the plaintiff in *Sandoz* filed her motion to certify thirteen months after filing her complaint, the doctrine would only be applied if, on remand, the district court determined that the named plaintiff "timely sought certification of her collective action." *Id.* Unlike *Sandoz*, no motion to certify the class action is pending in this case. In addition, given the differences between this case and all the district court cases cited by Symczyk, the Court declines to follow *Sandoz*.

action,[7] it was unclear whether the Rule 68 offer fully satisfied the plaintiff's claims,[8] or the plaintiff had

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[7] *See Nash*, 2010 U.S. Dist. LEXIS 50831, 2010 WL 446178, at *1 ("[O]ther parties have opted into this action and wish to have their claims resolved as part of a 'collective action' with Plaintiff."); *Yeboah*, 2007 U.S. Dist. LEXIS 81256, 2007 WL 3232509, at *5 (concluding that the presence of an additional individual in the collective action "requires the conclusion" that the Court retains subject matter jurisdiction over the action); *Rubery*, 494 F. Supp. 2d at 181 (finding dismissal to be premature when "more than fifty individuals ha[d] executed and filed forms consenting to join the action as a party plaintiff"); *Reyes*, 2005 U.S. Dist. LEXIS 11948, 2005 WL 4891058, at *3 (distinguishing the case at hand from a prior case finding a collective action to be moot, because "two other persons . . . have opted in to this suit, and [the defendant] has not made offers of judgment to them"); *see also Bowens*, 546 F. Supp. 2d at 79 ("[T]here was clear evidence at the outset of this case that other individuals were interested in joining. Indeed, at one time, there were no fewer than six . . . employees who had filed notices of consent. . . ."); *Roble*, 627 F. Supp. 2d at 1013 (declining to find the action to be moot, because "the named plaintiffs in this action have identified other potential . . . employees with an interest in this litigation"); *Guerra*, 2006 U.S. Dist. LEXIS 58973, 2006 WL 2290517, at *2-3 (declining to find a FLSA action to be moot when another employee had joined the collective action before the offer of judgment was made); *Geer*, 2006 2006 [sic] U.S. Dist. LEXIS 10903, [sic] WL 704933, at *3 (finding that "dismissal is not appropriate" because "the court received notice of a third plaintiff who has not received an offer of settlement").

[8] *See Geer*, 2006 U.S. Dist. LEXIS 10903, 2006 WL 704933, at *3 (finding dismissal to be inappropriate because the defendants did not explain how they arrived at the settlement amount they offered to the plaintiffs, the "plaintiffs argue that the offers are not sufficient," and thus, the "court is uncertain whether [the offer of judgment] amount constitutes full judgment").

already filed a motion for conditional certification under § 216(b).[9]

The present case does not involve any such facts. Symczyk does not contend that other individuals have joined her collective action. Thus, this case, like each of the district court cases cited by Defendants, which concluded that a Rule 68 offer of judgment mooted the underlying FLSA collective action, involves a single named plaintiff.[10] In addition, Symczyk does

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[9] *See Bah*, 2009 U.S. Dist. LEXIS 40803, 2009 WL 1357223, at *1-2 (declining to dismiss when the plaintiff had a motion for certification pending, and had attached an affidavit identifying a "friend and former co-worker, along with other employees" whom the plaintiff had observed as being potential members of the class); *Bowens*, 546 F. Supp. 2d at 80 (denying a motion to dismiss based on an offer of judgment when a motion for conditional certification was pending); *Roble*, 627 F. Supp. 2d at 1013 (same); *see also Morales-Arcadio v. Shannon Produce Farms*, 237 F.R.D. 700, 702 (S.D. Ga. 2006) (striking an offer of judgment when it was made after the court had conditionally certified the class).

[10] *See Darboe*, 485 F. Supp. 2d at 224 (concluding that the collective action had been mooted "[w]here no class action has opted in to the collective action"); *Briggs*, 2006 U.S. Dist. LEXIS 82891, 2006 WL 3314624, at *4 ("[T]here are no putative class members or collective action plaintiffs to represent. No collective plaintiffs have opted into this action and class certification has not been sought or granted. Thus, only Plaintiff's individual claims are at stake."); *Vogel v. Am. Kiosk Mgmt.*, 371 F. Supp. 2d 122, 127 (D. Conn. 2005) ("[W]ithout the inclusion of other active plaintiffs who have 'opted-in' to the suit, the section 216(b) plaintiff simply presents only her claims on the merits.") Section 216(b) provides that "no employee shall be a party plaintiff to any such action unless he gives his consent in writing to become

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not contest Defendants' assertion that the Rule 68 offer of judgment fully satisfied her claims. Under the Court's March 11, 2010 Scheduling Order, Plaintiff was given until June 10, 2010 to file a motion of conditional class certification. (Docket No. 10, ¶1.) The Court, however, was unaware when it issued the Scheduling Order that Defendants had already made Symczyk a Rule 68 offer of judgment. In view of the Rule 23 allegations now in the Amended Complaint, the Court will set the same date, June 10, 2010, for Symczyk to file a Motion for Rule 23 Certification, to be accompanied by a brief explaining how this Court retains jurisdiction over this action. The Court has tentatively concluded that Defendants' Rule 68 offer of judgment moots this collective action, and thus, that this collective action should be dismissed for lack of subject matter jurisdiction. In that event, the Court would likely decline, in its discretion, to exercise supplemental jurisdiction over Symczyk's claims under Pennsylvania law, which can be re-filed in state court. Although Symczyk will be given an opportunity to justify continued federal jurisdiction under Rule 23, the Court expresses doubt as to whether Symczyk can make such a showing, because the Rule 23 allegations in the case are limited to the state law claims, and Rule 23 does not itself confer jurisdiction. An appropriate Order follows.

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such a party and such consent is filed in the court in which action is brought." 29 U.S.C. § 216(b).

ORDER

AND NOW, on this 19th day of May, 2010, for the reasons stated in the foregoing Memorandum, upon due consideration of Defendants Genesis Healthcare Corporation and Eldercare Resources Corporation's (collectively, "Defendants") Motion to Dismiss for Lack of Subject Matter Jurisdiction (Docket No. 12), it is hereby ORDERED as follows:

1. Plaintiff Laura Symczyk shall file a brief in support of continued federal jurisdiction and a motion to certify a class under Federal Rule of Civil Procedure 23, by June 10, 2010;

2. Defendant shall have seven (7) days to respond; and

3. The Court will hold the Motion to Dismiss under advisement.

BY THE COURT:

/s/ Michael M. Baylson
Michael M. Baylson, U.S.D.J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAURA SYMCZYK	:	CIVIL ACTION
v.	:	
GENESIS HEALTHCARE CORPORATION, et al.	:	NO. 09-5782

ORDER

(Filed Jun. 24, 2010)

For the reasons stated in the Court's May 19, 2010 Memorandum (Docket No. 19), upon consideration of the parties' submissions acknowledging that an independent basis for federal jurisdiction over Plaintiff's state law claims no longer exists, and the parties' agreement that the statute of limitations for the state law claims is tolled from the date of the originally filed state complaint[1], it is hereby **ORDERED** by agreement as follows:

1. The Court's Order dated June 11, 2010 is **VACATED**;

2.. Plaintiff's FLSA claim is dismissed with prejudice for the reasons stated in the Court's May 19, 2010 Memorandum;

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[1] See *Symczyk v. Gensis Healthcare Corp*, No. 10-cv-1378 – MMB

3. In accordance with 28 U.S.C. § 1367© [sic], the Court declines to exercise supplemental jurisdiction over Plaintiff's remaining state law claims and therefore dismisses those claims without prejudice; and.

4. The Clerk of the Court shall mark this case **CLOSED**.

FOR THE COURT:

June 24, 2010
Date

/s/ Michael M. Baylson
Michael M. Baylson, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10-3178

LAURA SYMCZYK, an individual, on behalf of herself and others similarly situated,

Appellant

v.

GENESIS HEALTHCARE CORPORATION; ELDERCARE RESOURCES CORPORATION d/b/a GENESIS ELDERCARE

(D.C. Civ. No. 09-cv-05782)

SUR PETITION FOR REHEARING

(Filed Oct. 20, 2011)

Present: McKEE, *Chief Judge*, SLOVITER, SCIRICA, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR. and VANASKIE, *Circuit Judges*.

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing,

and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ Anthony J. Scirica
Circuit Judge

Dated: October 20, 2011
LML/cc: All counsel of record

OPPOSITION BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
MAY 25 2012
OFFICE OF THE CLERK

No. 11-1059

IN THE

Supreme Court of the United States

GENESIS HEALTHCARE CORPORATION and ELDERCARE RESOURCES CORPORATION,

Petitioners,

v.

LAURA SYMCZYK, an individual, on behalf of herself and others similarly situated,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Respondent's Brief in Opposition

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May 2012

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QUESTION PRESENTED

Laura Symczyk brought this action on behalf of herself and all other similarly situated individuals under § 216(b) of the Fair Labor Standards Act. Before Ms. Symczyk moved for conditional certification of the collective action, the defendants made a Rule 68 offer that provided complete relief on her individual claims. The question presented is:

Did defendants' Rule 68 offer to Ms. Symczyk render the entire collective action moot, or will a later-filed motion for conditional certification relate back to the filing of the complaint if it is made without undue delay?

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INTRODUCTION

In the decision below, the Third Circuit applied the relation back doctrine to ensure that Federal Rule of Civil Procedure 68 is not used to "pick[] off" successive plaintiffs in a Fair Labor Standards Act (FLSA) collective action. *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). It held that when a defendant, prior to the named plaintiff's motion for conditional certification, makes a Rule 68 offer that would have the possible effect of mooting the collective action, a later-filed motion for certification relates back to the filing of the complaint as long as the motion is made without undue delay.

Petitioners contend that the Third Circuit's decision reflects only the "idiosyncratic policy intuitions of individual judges" who failed to "draw coherent guidance" from this Court's case law. Pet. 14. Petitioners' rhetoric notwithstanding, the lower court engaged in a well-reasoned application of this Court's precedents. And although petitioners attempt to depict disarray among the lower courts, the only other court of appeals decision to address the applicability of the relation back doctrine to FLSA cases agrees with the decision below. Similarly, the circuit courts are not split over whether an unaccepted Rule 68 offer tendered before the named plaintiff moves for class certification renders a class action moot. Moreover, even if they were, this case would not be an appropriate vehicle for resolving that split. Certiorari is unwarranted, and the petition should be denied.

STATEMENT OF THE CASE

Laura Symczyk filed this case as a collective action under Section 216(b) of the FLSA, 29 U.S.C. § 216(b), alleging the petitioners violated the FLSA by implementing a policy under which they deducted thirty minutes from each employee's work time every shift for

meal breaks, regardless of whether the employee actually received an uninterrupted break for meals. Pet. App. 3. The complaint identified similarly situated individuals as including "all non-exempt employees of Defendants whose pay is subject to an automatic meal break deduction even when they perform compensable work during their meal breaks." *Id.* at 32. Such employees included secretaries, housekeepers, custodians, clerks, porters, registered nurses, respiratory therapists, administrative assistants, nurses' aides, and others. *Id.* at 32 n.1.

Two months after the complaint was filed, the defendants served Ms. Symczyk with a Rule 68 offer of judgment for $7,500 plus attorneys' fees, costs, and expenses. *Id.* at 4. Ms. Symczyk did not respond. A few weeks later, the district court entered an order providing for an initial 90-day discovery period after which Ms. Symczyk would move for "conditional certification" of the collective action. *Id.* at 4-5.[1]

The defendants then moved to dismiss for lack of subject matter jurisdiction, arguing that by offering Ms. Symczyk an amount greater than her potential recovery for her unpaid wages, the Rule 68 offer rendered the

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[1] As the court of appeals explained, although § 216(b)'s text does not refer to "certification," "[m]any courts and commenters . . . have used the vernacular of the Rule 23 class action for simplification and ease of understanding when discussing representative cases" under § 216(b). Pet App. 11-12. (quoting *Kelley v. Alamo*, 964 F.2d 747, 748 n.1 (8th Cir. 1992)). "As a result, courts commonly refer to a plaintiff's satisfaction of her burden at the [initial] notice stage [of the collective action] as resulting in 'conditional certification,' . . . or 'provisional certification[.]'" *Id.* (internal citations omitted). This brief will follow this common practice, as did both the district court and court of appeals.

case moot. *Id.* at 33. The district court "tentatively" agreed and dismissed the action. *Id.* at 43, 45.

The Third Circuit reversed. The court explained that "an offer of complete relief will generally moot the plaintiff's claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation." *Id.* at 14 (citation omitted). It recognized, however, that "conventional mootness principles do not fit neatly within the representative action paradigm." *Id.* In particular, the court noted that the Supreme Court had expressed concern over defendants' ability to manipulate Rule 68 to "pick[] off" plaintiffs in a representative action, quoting *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 339 (1980), in which this Court stated that "[r]equiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained" would "frustrate the objectives of class actions" and "invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement." Pet. App. 15.

The Third Circuit explained that, in *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004), it had resolved the tension between Rule 68 and class actions by applying the "relation back doctrine." Pet. App. 15-16. In *Weiss*, the defendants in a putative class action made a Rule 68 offer that provided complete relief on the plaintiff's individual claims before he moved for class certification. The Court concluded that the case was not moot, holding that "[a]bsent undue delay in filing a motion for class certification . . . where a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to

the filing of the class complaint." *Id.* (quoting *Weiss*, 385 F.3d at 348).

The court below traced the "relation back doctrine" applied in *Weiss* to *Sosna v. Iowa*, 419 U.S. 393 (1975), in which this Court explained that under circumstances in which "the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion," certification may "'relate back' to the filing of the complaint" when the issue otherwise "would evade review." *Id.* at 402 n.11. The Third Circuit noted that the relation back principle "has evolved to account for calculated attempts by some defendants to short-circuit the class action process and to prevent a putative representative from reaching the certification stage." Pet. App. 18. The "rationale underpinning the relation back doctrine," it explained, "serves to shield from dismissal on mootness grounds those claims vulnerable to being 'picked off' by defendants attempting to forestall class formation." *Id.*

Having reviewed its precedent applying the relation back doctrine in class actions and explained the grounding of that precedent in Supreme Court case law, the Third Circuit turned to whether the relation back doctrine applies in § 216(b) collective actions. The court concluded that it does, noting that the only other court of appeals to address the question—the Fifth Circuit—had reached the same conclusion. *Id.* at 24. The Third Circuit recognized the differences between Rule 23 class actions and § 216(b) collective actions, noting in particular that FLSA collective actions require each party plaintiff to affirmatively opt in. It determined, however, that "[a]lthough the opt-in mechanism transforms the manner in which a named plaintiff acquires a personal stake

in representing the interests of others, it does not present a compelling justification for limiting the relation back doctrine to the Rule 23 setting." *Id.* at 25. Like a Rule 23 class action, the court explained, a FLSA collective action is "'acutely susceptible to mootness' while the action [is] in its early stages and the court ha[s] yet to determine whether to facilitate notice to prospective plaintiffs." *Id.* at 26 (quoting *Weiss*, 385 F.3d at 347). Under such circumstances, it noted, the "relation back doctrine helps ensure the use of Rule 68 does not prevent a collective action from playing out according to the directives of § 216(b)[.]" *Id.* at 28.

Accordingly, the court held that "[a]bsent undue delay, when a FLSA plaintiff moves for 'certification' of a collective action, the appropriate course—particularly when a defendant makes a Rule 68 offer to the plaintiff that would have the possible effect of mooting the claim for collective relief asserted under § 216(b)—is for the district court to relate the motion back to the filing of the initial complaint." *Id.* The court remanded the case to the district court, noting that should Ms. Symczyk move for conditional certification on remand, the district court should consider whether the motion was made without undue delay, and if it finds it was, should relate the motion back to the date of the filing of the complaint. *Id.* at 28-29.

The defendants filed a motion for rehearing en banc, which was denied. *Id.* at 47-48.

REASONS FOR DENYING THE WRIT

In *Sosna v. Iowa*, 419 U.S. 393 (1975), this Court held that a certified class action does not become moot just because the named plaintiff's individual claims become moot. The Court further explained that "[t]here may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion." *Id.* at 402 n.11. "In such instances," the Court continued, "whether the certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review." *Id.*

In light of this "relation back" approach, the timing of class certification "is not crucial" to the mootness inquiry. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980); *see also id.* at 399 (recognizing case may not be moot where the claims are "so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires"). Where the relation back doctrine applies, the fact that "the class was not certified until after the named plaintiffs' claims had become moot does not deprive [the court] of jurisdiction." *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991).

Below, the Third Circuit recognized that the relation back doctrine properly applies when defendants attempt to moot entire collective actions by making offers of judgment only on the named plaintiff's individual claims before she has moved for certification. Moreover, it recognized that although there are differences between FLSA collective actions and Rule 23 class actions, those

differences are not relevant to the relation back analysis. The Third Circuit correctly applied the relation back doctrine, and review of the decision below is unwarranted.

I. The Circuits Are Not Split Over Whether the Relation Back Doctrine Applies in FLSA Cases.

Petitioners argue that the lower courts are in "disarray," with the court of appeals taking "diametrically opposed approaches to the extension of *Roper* and *Geraghty* to FLSA cases." Pet. 14, 15. As the Third Circuit pointed out, however, the only other court of appeals to address the issue here—whether the relation back doctrine applies when defendants in a FLSA action make an unaccepted Rule 68 offer to the representative plaintiff before she moves for conditional certification—reached the same conclusion as the court below. Pet. App. 24-25; *see Sandoz v. Cingular Wireless LLC*, 553 F.3d 913 (5th Cir. 2008).

In *Sandoz*, like in this case, the plaintiff filed a case styled as a collective action under § 216(b) of the FLSA; the defendants served the plaintiff with a Rule 68 offer that satisfied her individual claims before she had moved for conditional certification or other plaintiffs had opted in; and the plaintiff did not respond to the offer. *Id.* at 914. Like in this case, the court of appeals held that the relation back doctrine applied and the offer did not moot the case. *Id.* at 920-21.

The Fifth Circuit conducted its analysis in two stages. First, it considered whether the plaintiff in the FLSA action represented only herself or whether she also represented other similarly situated employees. Detailing the history of § 216(b), discussing the differences between § 216(b) collective actions (under which

plaintiffs must opt in) and Rule 23 class actions (under which plaintiffs are bound unless they opt out), and relying on the Eleventh Circuit's decision in *Cameron-Grant v. Maxim Healthcare Services, Inc.*, 347 F.3d 1240 (11th Cir. 2003), the court concluded that "in a FLSA collective action the plaintiff represents only him- or herself until similarly situated employees opt in." *Sandoz*, 553 F.3d at 919. Thus, according to the Fifth Circuit, when the defendant made its offer of judgment, the plaintiff "represented only herself, and the offer of judgment fully satisfied her claims." *Id.*

The Fifth Circuit recognized that "if [its] analysis stopped there, Sandoz's case would be moot." *Id.* However, the court's analysis did not stop there. Instead, the court went on to consider the relation back doctrine. The court explained that "the mootness principles described above would provide an incentive for employers to use Rule 68 as a sword, 'picking off' representative plaintiffs, and avoiding ever having to face a collective action," but that "[l]uckily . . . the relation back doctrine provides a mechanism to avoid this anomaly." Citing *Sosna*, 419 U.S. at 402 n.11, the court observed that "the 'relation back principle' ensures that plaintiffs can reach the certification stage.'" *Sandoz*, 553 F.3d at 919.

The Fifth Circuit noted that the cases it cited about the dangers of allowing defendants to pick off class representatives arose in the Rule 23 class action context rather than in the FLSA § 216(b) context. *Id.* at 920. However, although it had found the differences between Rule 23 class actions and FLSA collective actions to be relevant in determining whether a plaintiff in a collective action represented similarly-situated employees before they opted in, it did not consider those differences relevant for determining whether the relation back doctrine

applied. "The status of a case as being an 'opt in' or 'opt out' class action," it explained, "has no bearing on whether a defendant can unilaterally moot a plaintiff's case through a Rule 68 offer of judgment." *Id.* "[E]ach type of action would be rendered a nullity if defendants could simply moot the claims as soon as the representative plaintiff files suit." *Id.* Thus, it held, "when a FLSA plaintiff files a timely motion for certification of a collective action, the motion relates back to the date the plaintiff filed the initial complaint, particularly when one of the defendant's first actions is to make a Rule 68 offer of judgment." *Id.* at 920-21. The court remanded to determine whether Sandoz had timely sought certification of her collective action.

As the Third Circuit noted, *Sandoz* is the only other court of appeals decision "to address the applicability of the relation back doctrine in the FLSA context." Pet. App. 24. And *Sandoz* agrees with the decision below that the relation back doctrine applies in FLSA cases. Nonetheless, citing *Cameron-Grant*, 347 F.3d 1240, and *Smith v. T-Mobile USA, Inc.*, 570 F.3d 1119 (9th Cir. 2009), petitioners assert a circuit split over "the extension of *Roper* and *Geraghty* to FLSA cases." Pet. 22. Neither *Cameron-Grant* nor *Smith*, however, addressed, or even implicated, the relation back doctrine that served as the basis for the decision below.

In both *Cameron-Grant* and *Smith*, the plaintiffs filed actions that were styled as collective actions under FLSA § 216(b), and then moved for conditional certification or notification of the collective action, which was denied. After the motions were denied, the plaintiffs settled or dismissed their claims. They then appealed the denial of their motions. In considering whether they had jurisdiction to hear the appeals, both courts considered

the differences between Rule 23 class actions and FLSA collection actions and held that because FLSA claims are "opt in" instead of "opt out," the named plaintiffs had no right to represent other plaintiffs after they settled their individual claims. Because the plaintiffs did not have a right to represent other plaintiffs, the courts held that they had no continuing personal claims in the case and that the actions were moot.

In other words, both *Cameron-Grant* and *Smith* considered the question the Fifth Circuit addressed in the first part of *Sandoz*: whether a representative plaintiff in a FLSA collective action represents only herself or if she represents/is entitled to represent other plaintiffs before they opt in. Both agreed with *Sandoz* that, given how § 216(b) operates, the plaintiff did not represent other plaintiffs at that juncture. Indeed, *Smith* cites *Sandoz* with approval, *see Smith*, 570 F.3d at 1122, 1123, and *Sandoz* stated that it found *Cameron-Grant* "persuasive." *Sandoz*, 553 F.3d at 919. Both *Cameron-Grant* and *Smith* ended the analysis at the point where *Sandoz* stated "[i]f our analysis stopped there, Sandoz's case would be moot," *id.*, and both declared the plaintiffs' cases moot.

Thus, the difference between *Sandoz* and *Cameron-Grant/Smith* is that *Sandoz* proceeded to discuss the relation back doctrine, whereas *Cameron-Grant* and *Smith* did not. *Cameron-Grant*'s and *Smith*'s failure to address the relation back doctrine does not indicate their disapproval of that doctrine in FLSA cases or otherwise create a circuit split, however, because relevant factual and procedural differences distinguish this case and *Sandoz* from *Cameron-Grant* and *Smith*. Here and in *Sandoz*, the defendants sought to render the cases moot through Rule 68 offers of judgment, which the plaintiffs did not

accept. If such unilateral actions by the defendants rendered the collective actions moot, defendants could pick off successive representative plaintiffs, causing the issue of certification to "evade review." *Sosna*, 419 U.S. at 402 n.11. Under such circumstances, the relation back doctrine properly applies. In contrast, in *Cameron-Grant* and *Smith*, the plaintiffs *voluntarily* settled and dismissed their claims. Thus, the certification issue did not evade review because of unilateral actions by the defendant, but because of voluntary actions by the plaintiff. Whether the relation back doctrine applies under those circumstances, which do not implicate the "picking off" problem, is a much harder argument for the plaintiff and is not a question presented by this case. Indeed, the Third Circuit itself does not apply the relation back doctrine when the plaintiffs voluntarily settle their claims. *See Weiss*, 385 F.3d at 337 (discussing *Lusardi v. Xerox Corp.*, 975 F.2d 964 (3d Cir. 1992)).[2]

In short, *Cameron-Grant* and *Smith* addressed the first part of the *Sandoz* analysis—whether § 216(b) plaintiffs represent/are entitled to represent other employees before they opt in—and agreed with *Sandoz*. The decision below addressed the second part of the

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[2] In *Cameron-Grant*, the Eleventh Circuit noted that it had previously concluded that "the rule in *Geraghty* . . . applies when the named plaintiff settles his claim," not only when his claim is extinguished involuntarily. 347 F.3d at 1247 (citing *Love v. Turlington*, 733 F.2d 1562, 1565 (11th Cir. 1984)). However, *Cameron-Grant* was not addressing whether the voluntariness of the extinction of the claim mattered to the relation back doctrine—that is, to the second part of the *Sandoz* analysis. Rather, it was stating that voluntariness did not matter to whether the plaintiff had a personal stake in the right to represent the class. *Id.* at 1246-47.

Sandoz analysis—the relation back doctrine—and also agreed with *Sandoz*. And the court below would not have applied the relation back doctrine under the circumstances presented in *Cameron-Grant* and *Smith*. There is no circuit split here.

II. The Circuits Are Not Split Over Whether an Unaccepted Rule 68 Offer Tendered Before the Named Plaintiff Moves for Class Certification Renders a Class Action Moot.

Petitioners assert a secondary conflict over whether courts lose jurisdiction over class actions "when the plaintiff's claim is mooted before the filing of a motion to certify a collective proceeding." Pet. 22. Yet every court of appeals to consider whether an unaccepted Rule 68 offer that was made prior to a motion for class certification necessarily moots a collective proceeding has agreed that it does not. *See Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (9th Cir. 2011); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239 (10th Cir. 2011); *Sandoz*, 553 F.3d 913; *Weiss*, 385 F.3d 337. Petitioners' claimed circuit split ignores relevant differences in the procedural postures of the cases cited and in the questions addressed by those cases.

For example, in support of their claim of a split with the Fourth Circuit, petitioners cite *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88 (4th Cir. 2011). *Rhodes*, however, does not speak to whether an unaccepted Rule 68 offer tendered before a motion for class certification renders a class action moot, but to whether *voluntary* dismissal of individual claims moots a class action when the claims are dismissed after the denial of class certification. In *Rhodes*, after the district court denied a motion for class certification, the plaintiffs dismissed their claims and then sought to appeal the denial

of class certification. *Id.* at 99. The court of appeals noted that the Supreme Court had allowed such appeals when the plaintiffs' claims were involuntarily dismissed, but that it had not yet considered "whether Article III standing requirements are satisfied when a putative class representative who has voluntarily settled or dismissed his or her claims thereafter appeals denial of class certification." *Id.*; *see Geraghty*, 445 U.S. at 403 & n.10 (holding that a named plaintiff can appeal the denial of a motion for class certification when his claim has expired, but declining to express a view on whether he could appeal if he voluntarily settled his claim). The Fourth Circuit concluded that, given the voluntary nature of the dismissal, it lacked jurisdiction. *Rhodes* may have added to disagreement among the circuits over the question of whether a voluntary settlement or dismissal of the named plaintiff's claims prior to class certification renders the class action moot. That question, however, is not presented here.

Likewise, petitioners rely on a statement from *Anderson v. CNH U.S. Pension Plan*, 515 F.3d 823, 826-27 (8th Cir. 2008) that "voluntary settlements reached by the named plaintiffs [in a class action render] the entire case . . . moot," even when a motion for class certification is pending. Pet. 20. But, as in *Rhodes*, that statement speaks only to the effect of *voluntary* settlements, not to the effect of unaccepted Rule 68 offers. In *Anderson*, as in *Rhodes*, after the district court denied class certification, the named plaintiffs settled the case and then sought to appeal the denial of class certification. 515 F.3d at 824. The Eighth Circuit noted that cases are not necessarily moot where judgment is entered on the named plaintiffs' claims over their objection, but held that "the voluntary settlement reached by the named

plaintiffs" led it to conclude that the case was moot. *Id.* at 827.[8]

The only case relied on by petitioners in support of its claim of a conflict that did not involve a voluntary settlement or dismissal is *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011). In *Damasco*, the plaintiff filed a putative class action in state court. The defendant offered plaintiff his full request for relief and then removed the case to federal court, where the plaintiff moved for class certification. The defendant then moved to dismiss, contending that its offer mooted the case. The Seventh Circuit agreed. The court noted that it had "long held that a defendant cannot moot a case by making an offer *after* a plaintiff moves to certify a class, observing that '[o]therwise the defendant could delay the action indefinitely by paying off each class representative in succession,'" *Id.* at 895 (quoting *Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544, 546-47 (7th Cir. 2003)). And it recognized that other circuits had held that, "absent undue delay, a plaintiff may move to certify a class and avoid mootness even after being offered complete relief." *Id.* at 895-96 (citing *Pitts*, *Lucero*, *Sandoz*, and *Weiss*). It declined to hold that a complete offer of

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[8] Before addressing the effect of the settlement, *Anderson* noted in dicta that plaintiffs' claims against one defendant "likely ... were moot" even before the court ruled on the class certification motion when the plaintiffs "received and accepted" payment of their claims from the defendant. The court recognized that class certification "may be deemed to 'relate back' to the filing of the complaint in limited circumstances, when the underlying merits of any given plaintiff's case would 'evade review' by a declaration of mootness." 515 F.3d at 826 (quoting *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975)). However, it did not believe the claims in the case before it evaded review.

judgment made prior to a motion for class certification does not moot a case, however, finding that such a holding was "unnecessary" because plaintiffs could avoid the "buy-off problem" by moving to certify a class at the same time they filed their complaints. *Id.* at 896.

The Seventh Circuit recognized the possibility that its decision might have been different had the offer of judgment been made under Rule 68. It noted that some district courts in the Seventh Circuit have held that a Rule 68 offer of judgment does not moot a putative class action where the plaintiff seeks class certification within Rule 68's time frame for responding to the offer. *Id.* at 897. The court explained, however, that it "need not address the propriety of that approach here," because "[the defendant] made its offer while this suit was in state court, and Illinois procedure has no analog to Rule 68." *Id.*

Thus, although there is some tension between the analysis in *Damasco* and the analyses in *Pitts*, *Lucero*, *Sandoz*, and *Weiss*, the exact effects of a Rule 68 offer of judgment tendered prior to a motion for certification are still being worked out internally in the Seventh Circuit. Given the consistency among other circuits, *Damasco* does not make this case worthy of review.

III. This Case Does Not Present a Good Vehicle for Deciding Whether a Rule 68 Offer Tendered Before the Named Plaintiff Moves for Class Certification Renders a Class Action Moot.

Petitioners claim this case "is an ideal vehicle" for certiorari because the fact that it arises in the FLSA context puts a "range of issues before the Court." Pet. 22-23. Precisely because it arises in the context of a FLSA collective action, however, rather than in the con-

text of a Rule 23 class action, this case does not present a good vehicle for determining the effects of a Rule 68 offer on a putative class action. Petitioners emphasize their belief that even if an offer of judgment served prior to a motion for class certification did not render a class action moot, such a motion should render a FLSA action moot because of the differences between Rule 23 class actions and FLSA collective actions. Were the Court to agree with petitioners, despite the lack of a circuit split about the application of the relation back doctrine in FLSA cases, it would not reach the issue of whether a Rule 68 offer made prior to a motion for class certification moots a putative class action.

Moreover, cases that have considered whether a pre-certification offer of judgment that satisfies the named plaintiff's individual claims renders a representative action moot have generally involved Rule 23 class actions, not FLSA § 216(b) collective actions. If this court is interested in the effect of such a Rule 68 offer on a class action, it should await a case that arises in that context, which will enable the consideration of the interaction of Rules 68 and 23. *See, e.g., Weiss*, 385 F.3d at 342 ("Whenever possible we should harmonize the rules.").

Petitioners focus on the differences between class actions and FLSA collective actions in arguing that the decision below is wrong. But although they are correct that Congress amended § 216(b) in 1947, it "left intact the 'similarly situated' language providing for collective actions, such as this one." *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989); *see* Pet. App. 22. Petitioners also emphasize that in a collective action, plaintiffs who do not join the collective action are not bound by the result. *See* Pet. 10-11, 12-13. But in class actions as well, non-representative plaintiffs are not bound by

the case prior to class certification. Nonetheless, under appropriate circumstances, "the 'relation back' doctrine is properly invoked to preserve the merits of the case for judicial resolution." *County of Riverside*, 500 U.S. at 52. The Third Circuit properly invoked the relation back doctrine here.

In the end, petitioners fall back on policy arguments, contending that the decision below rests on a "fundamentally wrongheaded distaste for settlement" and "buttresses the unfortunate tendency of the lower courts to foster excessive litigation." Pet. 23, 24 (internal quotation marks and citation omitted). Petitioners' arguments, however, reflect a disagreement with this Court, which has recognized that what "invite[s] waste of judicial resources" and is "contrary to sound judicial administration" is allowing defendants to "pick[] off" successive plaintiffs by making offers of judgment before class certification is obtained—rather than allowing courts to reach the question of class certification despite such offers of judgment. *Roper*, 445 U.S. at 339.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

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IN THE

Supreme Court of the United States

GENESIS HEALTHCARE CORPORATION AND
ELDERCARE RESOURCES CORP.,
Petitioners,

v.

LAURA SYMCZYK,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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IN THE

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No. 11-1059

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REPLY BRIEF

ARGUMENT

The petition presents a single overarching legal principle – Article III at all times requires a live controversy with an interested plaintiff. That principle provides straightforward answers to all of the relevant cases: when the named plaintiff in a representative action loses a cognizable interest in the case, the litigation ordinarily becomes moot. The only exception is in cases, like *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), in which the case already involves interests of other parties in a tangible way. Pet. 8-14. This case is the easiest one, in which mootness is most plain, because the lone

plaintiff lost any interest in the case before any other parties had joined the litigation or otherwise attained any interest in it. Pet. 8-9.

Respondent's brief in opposition, by contrast, conspicuously omits any analysis of justiciable controversies or the cognizable interests of identifiable individual plaintiffs. Rather, diverting the Court's attention from that central weakness of the decision below, respondent seeks to make order out of the disarray in the existing courts of appeals decisions. Br. in Opp. 7-16. The distorted analysis necessary for respondent to reconcile the varied reasoning in the extant circuit decisions only buttresses the petition's claim that the problem warrants this Court's attention.

1. Respondent's analytical tack is to divide the various appellate decisions discussed in the petition into distinct categories and subcategories, claiming that this justifies ignoring disparate reasoning in the different categories. Br. in Opp. 7-15 (responding to Pet. 14-22). The fundamental difficulty that respondent cannot evade is that the distinctions she advances to justify the differing mootness determinations rest on factual attributes of the cases that have no plausible connection to any coherent doctrine of justiciability.

a. Respondent first discusses the cases involving the Fair Labor Standards Act ("FLSA"), and argues (Br. in Opp. 7-12) that there is no circuit split in those cases alone. Within that group of cases, respondent contends that the relevant distinguishing fact is that the plaintiffs in this case and *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913 (CA5 2008), lost their justiciable interest in the dispute because of an offer of judgment under Fed. R. Civ. P. 68.

Conversely, respondent emphasizes, the plaintiffs in *Cameron-Grant v. Maxim Healthcare Services, Inc.*, 347 F.3d 1240 (CA11 2003), and *Smith v. T-Mobile USA Inc.*, 570 F.3d 1119 (CA9 2009), settled voluntarily. Thus, respondent argues, this case and *Sandoz* hold that the absence of an interested plaintiff does not moot the case if the mootness comes from an offer of full relief, while *Cameron-Grant* and *Smith* hold that the absence of an interested plaintiff does moot a case, at least if the mootness comes from a voluntary settlement.

But respondent never explains *why* the manner in which a plaintiff loses its interest should resolve the constitutional question. To be sure, respondent does rest on the policy concern expressed in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), that an overbroad application of mootness doctrine would allow defendants to "pic[k] off" the plaintiffs in a representative action too easily (445 U.S. at 339). Untethered from the factual moorings of *Roper*, however, that general concern provides no basis for the decision below. As the petition explains (Pet. 8-14), the Constitution does not extend the federal judicial power to cases in which no plaintiff has an interest. The closely divided decisions in *Roper* and *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), respect that limitation, because in each case, the Court held, the plaintiff whose individual interest was moot had a representative relationship to other class members that was enough to sustain Article III justiciability. *See* Pet. 11-12.

Respondent repeatedly emphasizes (Br. in Opp. 6, 11) the discussion in *Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975). But *Sosna* is even less relevant in this context than *Roper* and *Geraghty*. Because the

district court in *Sosna* had certified a class action before the named representative lost an interest in the case, the controversy at every moment involved a plaintiff directly interested in the dispute. *See* 419 U.S. at 399 (noting that "the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant" "[w]hen the District Court certified the propriety of the class action"). As the *Sosna* Court emphasized, with a vigor that has escaped the notice of the courts of appeals:

> There must not only be a named plaintiff who has such a case or controversy at the time the complaint is filed, and at the time the class action is certified * * * but there must be a live controversy at the time this Court reviews the case. The controversy may exist, however, between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot.

419 U.S. at 402 (internal citation omitted).

The distinction between a voluntary settlement and an offer of judgment under Rule 68 has no logical relation to the nature of the relationship between absent third parties and the present, but disinterested, plaintiff.[1] And thus, respondent's reliance on

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[1] Indeed, if concerns about the propriety of settlements were relevant, they favor Rule 68 offers as a way to resolve litigation. A Rule 68 offer, after all, is effective only if a defendant offers everything sought in the complaint – a distant echo of a typical voluntary settlement, in which a plaintiff ordinarily compromises its claims to accept something far less than full relief. *See Roper*, 445 U.S. at 349 n.6 (Powell, J., dissenting) ("We may assume that respondents had some interest in the class-action

Rule 68 as the key to understanding the lower court decisions shows exactly where the lower courts have lost their way: in failing to ask whether it makes any sense to extend the decisions in *Sosna*, *Roper*, and *Geraghty* to a factual context (the FLSA) in which the dissipation of the interest of the named plaintiff leaves no identifiable individual with any interest in the case. To the extent FLSA cases are a distinct category, the relevant question they raise is not when a Rule 68 offer vitiates the mootness ramifications of a settlement (a question partially addressed by *Roper*). The key question (evaded by respondent, and never yet addressed by this Court) is whether it makes sense to extend *Roper* and *Geraghty*'s treatment of mootness in class actions to a context like the FLSA in which the individual plaintiff has no representative relationship to the absent parties. *See* Pet. 9-11.

b. Turning to respondent's second category, cases under Fed. R. Civ. P. 23, respondent must strain even more to reconcile the inconsistencies (Br. in Opp. 12-15). Respondent's primary strategy is to subdivide the Rule 23 cases. First, respondent considers Rule 23 cases involving voluntary settlements, repeating the argument that cases involving Rule 68 offers of judgment are fundamentally different from cases involving voluntary settlements. For the cases involving voluntary settlements, respondent candidly acknowledges the "disagreement among the circuits over the question of whether a voluntary settlement or dismissal of the named plaintiff's claims prior to

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procedure as a means of interesting their lawyers in the case or obtaining a satisfactory settlement * * * , but once respondents obtained both access to court and full individual relief that interest disappeared.").

class certification renders the question moot," but tries to sweep that problem under the rug as one "not presented here." Br. in Opp. 13.

Respondent then turns to her second subcategory, Rule 23 cases that involve offers of judgment. Here, respondent is particularly hard pressed to dispose of the Seventh Circuit's decision in *Damasco v. Clearwire Corp.*, 662 F.3d 891 (CA7 2011). As summarized in the petition, *Damasco* explicitly rejects contrary decisions of the Third, Fifth, Ninth, and Tenth Circuits. *See* Pet. 20 (discussing *Damasco*, 662 F.3d at 895). The only explanation respondent can provide for *Damasco* is that the offer of judgment in that case was made under a state procedural analogue to Rule 68. But if the distinction between voluntary settlements and offers of complete relief seems irrelevant to mootness doctrine, it is even harder to find a relevant distinction between state and federal procedures assessing the completeness of the offered relief. In either case, the mootness comes not from the procedural rule under which the offer is made, but from the cessation of the plaintiff's interest in the case that flows from the defendant's willingness to provide full relief. The need to articulate such a fanciful boundary for the Constitutional judicial power shows the need for redirection from this Court.

* * * * *

Respondent's exertions to reconcile the existing body of court of appeals decisions underscore the central thrust of the petition: as representative litigation has grown in the three decades since *Roper* and *Geraghty*, the lower courts have lost sight of the constitutional boundaries those decisions observed. Instead of identifying individual controversies as a

basis for justiciability, the courts have become preoccupied with the importance of enhancing the effectiveness of representative litigation as an enforcement mechanism. Only this Court can remind the courts of appeals, collectively, to confine their pursuit of such policy goals within the limitations of Article III.

2. Despite the proliferation of categories respondent proposes, respondent does not challenge the petition's demonstration (Pet. 14-22) that the decisions of the courts of appeals conflict along various fault lines. So, for example, respondent concedes (Br. in Opp. 12-15) a direct conflict between decisions of the Fourth and Eighth Circuits (holding that settlement before certification renders a case moot)[2] and decisions of the Third, Ninth, and Tenth Circuits (holding that certification after settlement can vitiate mootness by "relation back" to the complaint).[3] Similarly, respondent acknowledges (Br. in Opp. 14-15) the "tension" between the decision of the Seventh Circuit in *Damasco* (holding that an offer of judgment before a motion for certification rendered a case moot) and the decisions of the courts of appeals that follow the relation-back doctrine the Third Circuit articulated in *Weiss v. Regal Collections*, 385 F.3d 337 (2004). It is important to emphasize what those two conflicts

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[2] *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88 (CA4 2011); *Anderson v. CNH U.S. Pension Plan*, 515 F.3d 823 (CA8 2008).

[3] *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (CA9 2011); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239 (CA10 2011); *Weiss v. Regal Collections*, 385 F.3d 337 (CA3 2004); *see also Russell v. United States*, 661 F.3d 1371, 1376-78 (CAFed 2011) (following *Pitts* in case applying law of the Ninth Circuit).

illustrate: whether the cases involve Rule 68 offers of judgment or voluntary settlements, there are courts of appeals on both side of the matter. Thus, even accepting respondent's scheme of categories, the difference between voluntary settlements and offers of relief is not enough to reconcile the decisions of the courts of appeals.

More broadly, respondent's unconsidered reliance on *Roper* and *Geraghty* exposes the internal incoherence of the brief in opposition. On the one hand, to minimize the disarray in existing decisions, respondent must assert that the tension between the decision below and decisions like *Damasco* and *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88 (CA4 2011), is irrelevant. To that end, respondent emphasizes (Br. in Opp. 13-15) that *Damasco* and *Rhodes* involve Rule 23 rather than the FLSA. At the same time, needing a doctrinal justification for the decision below, respondent portrays this case and *Sandoz* as straightforward applications of the rules *Roper* and *Geraghty* developed in the early days of Rule 23. But respondent cannot say that Rule 23 decisions are irrelevant for purposes of assessing conflicts with FLSA decisions, while at the same time justifying the FLSA decision below as a straightforward application of the law under Rule 23.

The central weakness of respondent's argument lies in the substance of the difference between Rule 23 and the FLSA. Respondent is correct to suggest that FLSA cases differ in important ways from cases under Rule 23, but those differences make it markedly *less* appropriate to rely in the FLSA context on the interests of absent individuals as a barrier to mootness. Under the FLSA, absent parties have no justiciable relation to the controversy unless and

until they affirmatively join the case. *See Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 175-76 (1989) (Scalia, J., dissenting)[4]; *see* Pet. 9-11 (detailed discussion of the difference between collective actions under the FLSA and class actions under Rule 23). Thus, it should be *harder*, not *easier*, to justify a finding of justiciability in no-plaintiff FLSA cases. In any coherent regime, a finding of mootness in this case would follow *a fortiori* from cases like *Damasco* and *Rhodes*.

In the end, respondent cannot deny the disarray in the courts of appeals. Even within the narrowest category of FLSA cases, respondent effectively concedes that the Eleventh and Ninth Circuits would approach this case differently than the Third and Fifth Circuits. Br. in Opp. 10-11 (explaining that "the difference between *Sandoz* and *Cameron-Grant/Smith* is that *Sandoz* proceeded to discuss the relation back doctrine, whereas *Cameron-Grant* and *Smith* did not"). As the petition explains in detail (Pet. 18-19), the Ninth and Eleventh Circuits require dismissal of FLSA cases when the only party to the case has no further interest; the willingness of the Third and Fifth Circuits to consider other justifications for keeping the case alive without a plaintiff is precisely the issue that cries out for review.

* * * * *

The courts of appeals have gone far beyond developing slightly differing formulations to approach a complex problem. In the last year, the courts of

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[4] In this regard, it is important to note that the relevant FLSA provision does not provide for injunctive relief (*see* Pet. 9 n.1). There is accordingly no possibility that relief for the named plaintiff will benefit absent non-parties.

appeals that reject the relation-back doctrine have repeatedly acknowledged and rejected the conflicting views of other courts and made it clear that they will not retreat absent intervention by this Court. *Rhodes*, 636 F.3d at 100; *Damasco*, 662 F.3d at 895. Further percolation will not resolve the disagreement.

3. The petition identifies two distinct areas in which the courts of appeals have struggled: whether *Roper* should be extended to FLSA cases; and how far a case must proceed toward certification for *Roper* to apply. Respondent argues (Br. in Opp. 15-17) that this case is a poor vehicle because it presents both of those problems. Respondent accurately notes that the Court would not be in a position to reverse the court of appeals on both of those points, but reasons from that premise to the conclusion that this case is a poor vehicle. That argument is specious.

If the Court takes a single case that presents only one of the two issues, it could address only that issue, and necessarily would leave the other open.[5] Conversely, if it takes a case like this one, that presents both issues, there is at least the possibility that the Court could address both issues. On that point, the Court should note respondent's concession (in her

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[5] In any event, despite the frequency with which the issue arises (decisions in 2011 from the Third, Fourth, Seventh, Ninth, Tenth, and Federal Circuits), this case appears to be the only case presently mature for the Court's consideration. The judgment of the Seventh Circuit in *Damasco*, *supra*, apparently became final last month when the plaintiff did not file a petition seeking review of that decision. *See Damasco v. Clearwire Corp.*, No. 11A-902 (Mar. 23, 2012) (Kagan, Circuit J.) (granting an extension of time to May 3, 2012, within which to seek review of the Seventh Circuit's decision in *Damasco*).

formulation of the question presented) that petitioners' offer "provided complete relief on her individual claims." That concession perfects the factual setting necessary for the legal questions raised by the petition; the Court need not fear factual complications that would muddy plenary review.

Moreover, even if the Court reached only the FLSA problem, the rapidly burgeoning litigation under that statute makes the problem independently worthy of review. *See* Amicus Br. of Chamber of Commerce et al. 16-21. Similarly, the importance of uniform and reliable rules for settling class actions is self evident, in a world in which plaintiffs are free to choose the forum in which they file and in which settlement is so much cheaper than full-blown litigation. *See* Pet. 23-24. In an area of frequent litigation and acknowledged disarray, unaddressed by the Court for three decades, the likelihood that the Court could not settle all of the problems with any single case is not a persuasive reason to pass on a clean chance to provide timely guidance on some of the issues.

Respondent closes with the disingenuous suggestion that the arguments in the petition are grounded only in policy, and specifically that they rest on a distaste for the "sound judicial administration" respondent perceives as supporting the decision below (Br. in Opp. 17). Nothing is further from the truth. The petition disclaims any argument about the social value of the system of litigation contemplated by the court below and by the panels in *Weiss* and *Sandoz*. Indeed, it is conceivable that policymakers might prefer to leave the task of statutory enforcement to private law firms entirely free from the need to locate individual clients. That is not, however, a system in

which Article III permits the federal judiciary to participate.

* * * * *

In sum, the confusion about the justiciability of collective litigation when the plaintiff receives full relief rests entirely on the courts' conflicting understandings of this Court's opinion in *Roper*. Only this Court can provide a single binding explication of that opinion that will guide the decisions of the courts of appeals back into uniform compliance with the Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORP., PETITIONERS

v.

LAURA SYMCZYK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN HEALTH CARE ASSOCIATION, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND THE NATIONAL CENTER FOR ASSISTED LIVING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.2(b), the Chamber of Commerce of the United States of America, the American Health Care Association, the National Federation of Independent Business, and the National Center for Assisted Living (collectively, the proposed *amici*) respectfully request leave to submit the accompanying brief as *amici curiae* in support of petitioners Genesis HealthCare Corporation and ElderCare Resources Corp. Consent to file the accompanying brief was granted by petitioners and refused by respondent.

The petition for a writ of certiorari asks the Court to decide whether a case becomes moot, and thus beyond the judicial power of Article III, when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff's claims. That fundamental question of federal law is presented in the context of a putative collective action under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219, which establishes nationwide rules related to minimum wages, maximum hours, and overtime pay.

The proposed *amici* have a direct and substantial interest in the issue presented by this case. As membership organizations, the proposed *amici* represent entities that collectively employ millions of individuals in every industry sector and geographic region of the United States. As explained in detail by the accompanying brief, the past decade has witnessed an unprecedented explosion in the number of putative collective actions filed under the FLSA. Such actions have become a popular means for extracting large payments from employers, many of

whom cannot afford litigation on the merits or risk defending themselves at trial given the generous recoveries authorized by the FLSA. Consistent with Supreme Court Rule 37.1's admonition that *amici* should assist the Court by bringing additional relevant information to the Court's attention, the accompanying brief uses recent congressional testimony and statistics compiled by the Administrative Office of the United States Courts to quantify the sharp rise in FLSA litigation and explain its principal causes.

The Court's resolution of the question presented would provide necessary guidance regarding Article III's personal-stake requirement and the mootness doctrine. It has been thirty-two years since the Court issued two closely decided rulings addressing mootness in the context of class actions under Federal Rule of Civil Procedure 23. Since then, lower federal courts have struggled to apply those decisions not only to Rule 23 class actions, but they have struggled to adapt their application to the very different context of putative collective actions under the FLSA. Because the origin of the present disagreement of authority lies in language contained in two of the Court's decisions, only the Court can resolve the issue to provide much-needed certainty and predictability on this important Article III question.

For the foregoing reasons, the Court should grant the proposed *amici* leave to file the accompanying brief.

Respectfully submitted.

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INTEREST OF *AMICI CURIAE*

Amicus curiae the Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every geographic region of the United States.[1] An important function of the Chamber is to represent the interests of its members by participating as *amicus curiae* in cases involving issues of national concern to American business. Cases raising significant questions for employers subject to potential class or collective actions are of particular concern to Chamber members. *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 760 (2011) (granting review in case where Chamber submitted petition-stage *amicus* brief addressing deference owed federal agency's interpretation of Fair Labor Standards Act); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (addressing standard for class certification in case where Chamber submitted petition- and merits-stage *amicus* briefs).

Amicus curiae the American Health Care Association (AHCA) is the Nation's largest association of

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners have consented to the filing of this brief and their written consent has been filed with the Clerk. Respondent has withheld her consent. Counsel of record for petitioners and respondent received notice of *amici*'s intent to file this brief more than ten days before the due date.

long-term and post-acute care providers, representing the interests of nearly 11,000 non-profit and proprietary facilities. AHCA's members are dedicated to improving the delivery of professional and compassionate care to more than 1.5 million frail, elderly, and disabled citizens who live in nursing facilities, subacute centers, and homes for persons with developmental disabilities. AHCA advocates for quality care and services for frail, elderly, and disabled Americans. In order to ensure the availability of such services, AHCA also advocates for the continued vitality of the long-term and post-acute care provider community.

Amicus curiae the National Federation of Independent Business (NFIB) is the Nation's leading small business advocacy association, representing members in Washington, D.C., and in all fifty state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents over 300,000 member businesses nationwide and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the Nation's courts through representation on issues of public interest affecting small businesses. To fulfill that role, the NFIB Legal Center frequently files *amicus* briefs in cases that will affect small businesses.

Amicus curiae the National Center for Assisted Living (NCAL) is a federation of state affiliates representing more than 2,700 nonprofit and for-profit assisted living and residential care communities nationwide. NCAL is dedicated to promoting high-quality, principle-driven assisted living care and services with a steadfast commitment to excellence, innovation, and the advancement of person-centered care.

Amici have a significant interest in cases presenting important questions under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219, which establishes nationwide rules related to minimum wages, maximum hours, and overtime pay for their members. In its present form, the statute covers more than 130 million workers in every conceivable industry. *See The Fair Labor Standards Act: Is It Meeting the Needs of the Twenty-First Century Workplace?, Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce,* 112th Cong. 2 (2011) (statement of Rep. Walberg) (*House Hearing*).

Amici are committed to helping their members comply with all labor and employment laws. However, *amici* also have a significant interest in ensuring that their members are spared the significant burden and expense imposed by lawsuits prosecuted, not by plaintiffs with a personal stake in the outcome as required by Article III, but by lawyers in search of new clients. The decision of the Third Circuit at issue here interprets the Court's Article III jurisprudence and the FLSA to permit exactly that.

As discussed more fully below, putative collective actions under the FLSA have become a popular

means for extracting significant payments from employers large and small, many of whom cannot afford litigation on the merits or risk defending themselves at trial given the generous recoveries authorized by the FLSA. By holding that putative collective actions under the FLSA must continue even though the defendants have offered the only named plaintiff complete relief and no other employee has joined the suit, the Third Circuit's decision sacrifices core jurisdictional limitations imposed by Article III in order to reach the policy-driven goal of promoting private enforcement of the FLSA.

SUMMARY OF ARGUMENT

Plenary review of the Third Circuit's decision is warranted for at least two reasons in addition to those set forth in the petition for a writ of certiorari.

First, the petition presents a fundamental question of federal law that only the Court can resolve. It has been thirty-two years since the Court issued two closely decided rulings addressing mootness in the context of class actions under Federal Rule of Civil Procedure 23. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980); *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980). Lower federal courts have struggled to apply those decisions not only to Rule 23 class actions, but they disagree as to whether the logic of those decisions should apply in the very different context of FLSA collective actions. Unlike Rule 23 class actions, Congress has limited putative collective actions under the FLSA by requiring the filing of formal opt-in notices by any employee wishing to join the suit. Congress also eliminated the right of employees to designate as representative plaintiffs persons who have no personal

stake in the case's outcome. Because the origin of the present disagreement of authority lies in language contained in two of the Court's decisions, only the Court can resolve the issue.

Second, the decision below will harm employers who are presently inundated by a tidal wave of FLSA litigation. In the past decade alone, the number of FLSA suits filed annually has grown by almost 300 percent, affecting nearly every segment of the national economy. Because the FLSA is a strict-liability statute that requires courts to award attorney's fees to prevailing plaintiffs, and because the scope of the FLSA is subject to considerable uncertainty, employers that believe they have complied with the statute in good faith are often forced to settle unmeritorious suits rather than face the risk of catastrophic judgments. The Third Circuit's decision deprives employers of a reasonable means to avoid burdensome FLSA litigation, based primarily on the Third Circuit's policy judgment that further discovery and litigation *might* motivate others to join a suit being prosecuted by counsel who no longer represents a client with a personal stake in the case's outcome. Further percolation of the question presented is unnecessary and is unlikely to produce new appellate decisions on point because the FLSA permits plaintiffs wide discretion in deciding where to file suit, which in turn will likely lead to forum shopping whereby all significant new cases are defensively filed in those circuits with less stringent mootness precedent.

Accordingly, the petition should be granted and the judgment of the court of appeals reversed.

ARGUMENT

I. The Petition Presents a Fundamental Question of Federal Law That Only The Court Can Resolve

The origin of the present mootness controversy can be traced to language contained in *Roper* and *Geraghty*, both of which addressed mootness issues in the Rule 23 class action context. As explained below, the majority opinions in *Roper* and *Geraghty* relied on the unique factual circumstances presented in each case to reach narrow conclusions limited to the Rule 23 context. However, despite the significant conceptual differences between Rule 23 class actions and FLSA collective actions, some courts, including the Third Circuit, have misappropriated *Roper* and *Geraghty* for use in the FLSA context. Therefore, plenary review by the Court is warranted.

a. In *Roper*, two credit card holders filed a putative class action against the bank that issued their credit cards. 445 U.S. at 328. In seeking class certification, the cardholders sought to spread the cost of pursuing the litigation amongst the class under the common-fund doctrine. *See id.* at 334 n.6. After the district court denied the cardholders' motion for class certification, the bank tendered an offer of judgment to each named plaintiff that, unlike the offer at issue in this case, did not include attorney's fees. *Id.* at 329. Although the named plaintiffs rejected the offer of judgment, the district court entered judgment in the bank's favor. *Id.* at 330.

A majority of the Court held that the bank's offer of judgment did not moot the named plaintiffs' appeal of the denial of their motion seeking class certification. Writing for the majority, Chief Justice Bur-

ger explained that the named plaintiffs retained a personal stake in the outcome of the class-certification question because of their desire to "shift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails." *Id.* at 336. Noting that a "district court's ruling on the certification issue is often the most significant decision rendered in these class-action proceedings," the majority believed that to deny the right to appeal under these circumstances would be contrary to "sound judicial administration." *Id.* at 339. Using language that would later appear in this and similar cases, the majority also observed that "[r]equiring multiple plaintiffs to bring separate actions, which effectively could be '*picked off*' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions." *Id.* (emphasis added). *But see Roper*, 445 U.S. at 353 (Powell, J., dissenting) ("I know of no decision by any court that holds that a lawyer's interest in a larger fee, to be paid by third persons not present in court, creates the personal stake in the outcome required by Art. III.").

Geraghty, which was argued and decided the same day as *Roper*, involved a putative class action filed by a prisoner challenging the legality of parole guidelines issued by an agency. 445 U.S. at 393. The district court denied the prisoner's motion for class certification and granted the agency's motion for summary judgment. *Id.* The prisoner appealed but was released from prison shortly thereafter. *Id.* at 394.

A five-Justice majority held that the prisoner's appeal of the denial of his class-certification motion was not moot. *Id.* at 404. Justice Blackmun's majority opinion first determined that a "live" controversy still existed because prisoners who were currently incarcerated and subject to the agency's parole guidelines had filed motions with the Court seeking to be substituted on behalf of the named plaintiff. *Id.* at 396. As for Article III's personal-stake requirement, the majority believed that the mootness doctrine was "flexible" enough that a "proposed representative retains a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined." *Id.* at 404. Although he acknowledged that a person seeking to use the class-action device does not possess a legally cognizable interest "in the traditional sense," *id.*, Justice Blackmun believed that the "Federal Rules of Civil Procedure give the proposed class representative the *right* to have a class certified," *id.* at 403 (emphasis added). This "right," the majority believed, was "more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement." *Id.*

Justice Blackmun's opinion drew a lengthy dissent from Justice Powell. *Geraghty*, 445 U.S. at 409 (Powell, J., dissenting). Writing on behalf of three other Members of the Court, Justice Powell rejected the notion that mootness was a "flexible" doctrine, believing that the majority's alteration of the doctrine to accommodate "nontraditional" forms of litigation departed from settled law. *Id.* Although he agreed that a live controversy still existed, *id.* at 410,

Justice Powell emphasized the constitutional nature of the personal-stake requirement in concluding that it was no longer satisfied. "Since the question is one of power," Justice Powell explained, "the practical importance of review cannot control. . . . Nor can public interest in the resolution of an issue replace the necessary individual interest in the outcome. . . ." *Id.* at 411-12. Rejecting the notion that Rule 23 created a "right" to have a class certified if the requirements of the rule were met, *id.* at 421, Justice Powell concluded that, "[i]n any realistic sense, the only persons before this Court who appear to have an interest are the defendants and a lawyer who no longer has a client," *id.* at 424.

Roper and *Geraghty*, then, were both decided in the context of very unique factual circumstances that are not present in this case. First, and most fundamentally, both cases were Rule 23 class actions. *Roper* relied explicitly on the "objectives" of class actions, while *Geraghty* relied on the representative nature of class actions. FLSA collective actions, by contrast, share neither the same objectives nor the same representational nature as Rule 23 class actions, as discussed in more detail below.

Second, the district courts in *Roper* and *Geraghty* had denied motions for class certification before the issue of mootness arose, threatening the ability of anyone to obtain timely appellate review of what were later determined to be erroneous denials of class certification. In this case, however, respondent never filed a motion for conditional certification.

Third, unlike the offer of judgment in *Roper*, it is uncontested that the offer of judgment at issue here afforded respondent complete relief. Pet. App. 43.

b. There are significant conceptual differences between collective actions under the FLSA and Rule 23 class actions. Since its enactment in 1938, the FLSA has allowed employees to sue their employers for violations of the statute. *See* Fair Labor Standards Act of 1938, ch. 676, § 16(b), 52 Stat. 1060, 1069 (codified as amended at 29 U.S.C. § 216(b)). Due in part to the FLSA's openness to abuse, Congress has narrowed the scope of the statute's private-enforcement scheme over time.

As first enacted, the FLSA allowed private actions to be brought "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, *or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated.*" Fair Labor Standards Act of 1938 § 16(b), 52 Stat. at 1069 (emphasis added). As originally enacted, then, FLSA collective actions resembled Rule 23 class actions in their representative nature.

Less than a decade later, however, Congress amended the FLSA, citing concerns over "excessive and needless litigation and champertous practices." Portal-to-Portal Act of 1947, ch. 52, § 1(a)(7), 61 Stat. 84 (codified at 29 U.S.C. § 251(a)(7)). As is relevant here, Congress banned representative actions by deleting the "designate an agent or representative" clause from the FLSA's private-enforcement provision. *Id.* § 5(a), 61 Stat. at 87. To ensure that employees had a say over their own interests and that

suits were not prosecuted by persons lacking a personal stake in the case's outcome, Congress also added a formal opt-in system whereby "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." *Id.* (codified at 29 U.S.C. § 216(b)).

As a result of these statutory amendments, putative collective actions under the FLSA are a "fundamentally different creature than the Rule 23 class action." *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003) (per curiam). For example, the existence of a class under Rule 23 "does not depend in theory on the participation of other class members. Irrespective of whether other class members take any or no role in the action, they are bound by the judgment, whether favorable or unfavorable, unless they affirmatively 'opt out' of the suit." *Id.* at 1248. The opposite is true in the FLSA context because of the statute's opt-in requirement. *Id.* at 1249. Moreover, unlike the situation presented in *Geraghty*, the named plaintiff in an FLSA suit "has no claim that he is entitled to represent other plaintiffs." *Id.*

c. In the thirty-two years since *Roper* and *Geraghty* were decided, the Court has continued to emphasize that an actual, live controversy must exist at all stages of litigation. *See, e.g.*, *Alvarez v. Smith*, 130 S. Ct. 576, 580 (2009). The Court, however, has not had occasion to address Article III's personal-stake requirement in class actions with different factual circumstances from *Roper* and *Geraghty*, such as actions in which an offer of judgment provides complete relief to the named plaintiff and no motion

for class certification has been filed. More importantly, the Court has not had occasion to decide whether Congress's elimination of representative FLSA actions and enactment of the opt-in requirement alters the Article III calculus for FLSA collective actions. This is particularly true in this case, where no other employee has opted in to a case brought by a plaintiff whose individual claim is now moot.

The absence of guidance from the Court has resulted in confusion at the federal appellate level regarding how to apply *Roper* and *Geraghty* both in the Rule 23 context and in the context of FLSA collective actions. *Compare Damasco v. Clearwire Corp.*, 662 F.3d 891, 896 (7th Cir. 2011) ("To allow a case, not certified as a class action and with no motion for class certification even pending, to continue in federal court when the sole plaintiff no longer maintains a personal stake defies the limits on federal jurisdiction expressed in Article III."), *reh'g en banc denied*, No. 10-3934 (7th Cir. Jan. 4, 2012); *Smith v. T-Mobile USA Inc.*, 570 F.3d 1119, 1122-23 (9th Cir. 2009) (holding that a named plaintiff in a putative collective action under the FLSA does not have a "right" to represent other employees analogous to the Rule 23 "right" recognized by Justice Blackmun in *Geraghty*, such that when the named plaintiffs' claims are rendered moot by a settlement and no other employee has filed an opt-in notice, the entire action is moot); *and Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1248-49 (11th Cir. 2003) (per curiam) (same), *with Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091-92 (9th Cir. 2011) (holding that a rejected offer of judgment for the full

amount of a named plaintiff's individual claim does not moot a putative Rule 23 class action where the offer precedes the filing of a motion for class certification); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1249 (10th Cir. 2011) (same); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 919-21 (5th Cir. 2008) (agreeing with the Eleventh Circuit's conclusion regarding the conceptual differences between Rule 23 class actions and FLSA collective actions, but finding the case not moot because, although the defendants' offer of judgment had mooted the named plaintiff's individual claim under the FLSA, the named plaintiff had filed a motion seeking conditional certification).

Even those federal courts that have allowed a named plaintiff to continue a case under circumstances similar to those at issue here have recognized the unsettled nature of the mootness question. For example, the Fifth Circuit expressly acknowledged that the "complex interplay" between offers of judgment and the FLSA's collective-action provision presents "difficult" questions. *Sandoz*, 553 F.3d at 914. Similarly, after surveying the Court's mootness precedent in the class-action context, the Tenth Circuit recently conceded the existence of "tension in the legal concepts that must control our decision here." *Lucero*, 639 F.3d at 1249; *see also* Pet. App. 20 (acknowledging that the district court in this case, which dismissed the case on mootness grounds, had

relied on a "careful analysis" of various courts' efforts to "grapple" with the mootness question).[2]

Legal commentators have also acknowledged the unresolved nature of the Court's mootness jurisprudence following *Roper* and *Geraghty*. *See, e.g.*, 15 James Wm. Moore et al., *Moore's Federal Practice* § 101.94[4][c] at 101-268 (3d ed. 2011) (discussing disagreement of authority as to whether pre-

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[2] Confusion has not been confined to the federal judiciary. State appellate courts, which often look to this Court's mootness jurisprudence for guidance, have been unable to apply *Roper* and *Geraghty* with any consistency. For example, the Supreme Court of Illinois recently rejected a named plaintiff's reliance on *Roper*'s "pick off" language in a putative class action, finding that the action was mooted by the defendant's offer of complete relief prior to the named plaintiff filing a motion for class certification. *Barber v. Am. Airlines, Inc.*, 948 N.E.2d 1042, 1044-47 (Ill. 2011); *see also DeCoteau v. Nodak Mut. Ins. Co.*, 2001 ND 182, ¶ 15, 636 N.W.2d 432, 437 ("When a named plaintiff whose individual claim becomes moot has not even moved for class certification prior to evaporation of his personal stake in the lawsuit, courts uniformly hold the plaintiff may not avail himself of the class action exception to the mootness doctrine."); *Frazier v. Castle Ford, Ltd.*, 27 A.3d 583, 591 (Md. Ct. Spec. App.) (rejecting named plaintiff's reliance on *Roper*'s "pick off" language and concluding that "better reasoned cases support the principle that, if the individual claims of the named plaintiffs are satisfied by settlement or tender of full payment after the filing of the complaint but before the filing of a motion for class certification, the entire action must be dismissed as moot"), *cert. granted*, 33 A.3d 981 (Md. 2011). *But see Jones v. S. United Life Ins. Co.*, 392 So. 2d 822, 823 (Ala. 1981) (relying on *Roper*'s "pick off" language in finding defendant's pre-certification tender of payment to named plaintiff, which mooted her individual claim, did not moot putative class action).

certification offers of judgment moot putative class actions); 13C Charles Allen Wright et al., *Federal Practice and Procedure* § 3533.9.1 at 523 (3d ed. 2008) (expressing dissatisfaction with the Court's mootness precedent in the class-action context); David Hill Koysza, Note, *Preventing Defendants from Mooting Class Actions by Picking Off Named Plaintiffs*, 53 Duke L.J. 781, 791 (2003) (explaining that, without further guidance from the Court, lower courts are "sharply divided over the effect of full offers [of judgment] conveyed before the named plaintiff files the [class] certification motion"); *see also* Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 Geo. Wash. L. Rev. 562, 621-22 (2009) (arguing that the "judicially developed exceptions to the mootness doctrine cannot be reconciled with the constitutional account of mootness").

Roper and *Geraghty* do not represent exceptions to Article III's case-or-controversy requirement, nor could they given the constitutional basis of that requirement and its personal-stake sibling. At most, *Roper* and *Geraghty* illustrate how those requirements may be applied in the unique factual circumstances presented in those cases. The Third Circuit's decision in this case, however, evidences the fact that the weakening of the personal-stake requirement is not being confined to the narrow factual circumstances confronted by the Court in *Roper* and *Geraghty*. Therefore, this case presents an opportunity for the Court to provide much-needed guidance on a fundamental question of federal law that only the Court can resolve.

II. The Third Circuit's Decision Will Further Exacerbate the Significant Burden Placed on Employers by an Ever-Growing Wave of FLSA Litigation

By holding that putative collective actions under the FLSA must continue even though the defendants have offered the only named plaintiff complete relief and no other employee has joined the suit, the Third Circuit improperly allowed policy considerations to trump Article III's requirement that a live case or controversy exist at all times for a case to be justiciable. Moreover, the Third Circuit did not give sufficient consideration to the significant public policy considerations counseling against its holding. For example, the Third Circuit's decision deprives employers of one of the only reasonable means to avoid burdensome litigation in the FLSA context—all in the hope that further discovery and litigation *might* motivate others to join a suit being prosecuted by counsel who no longer represents a client with a personal stake in the case's outcome. In doing so, the Third Circuit's decision transforms federal courts into roving commissions seeking evidence of potential wrongdoing involving parties not before the court, a result that Article III prohibits.

This is no mere technicality raised in the context of an arcane, rarely asserted statutory cause of action. The past decade has witnessed nothing less than an explosion in FLSA litigation. Statistics published by the Administrative Office of the United States Courts reveal that for the twelve-month period ending March 31, 2001, a total of 1,961 FLSA actions were commenced in district courts throughout the United States. *Federal Judicial Caseload*

Statistics 46 (2001). For the twelve-month period ending March 31, 2011, that number had grown to 7,008—a nearly 300 percent increase. Administrative Office of the U.S. Courts, *Federal Judicial Caseload Statistics* 48 (2011); *see also House Hearing* at 29 (charting exponential increase in number of FLSA actions). Between federal fiscal years 2009 and 2010, there was a 13 percent increase in cases commenced under the FLSA, accounting for much of the growth in total federal question filings at the district court level. Administrative Office of the U.S. Courts, *2010 Annual Report of the Director: Judicial Business of the United States Courts* 20 (2011).[3]

Two factors are widely credited with driving the drastic increase in FLSA litigation. First, unlike most federal statutory schemes permitting private enforcement, the FLSA *requires* a district court to award attorney's fees to a successful plaintiff, regardless of the wage amount at issue. *Compare, e.g.*, 29 U.S.C. § 216(b) ("The court in [an FLSA] action *shall*, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.") (emphasis added), *with* 29 U.S.C. § 1132(g)(1) (allowing district courts discretion to award attor-

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[3] FLSA litigation is now so prevalent that at least one national publisher recently launched a new service dedicated solely to tracking FLSA cases. *See* Press Release, Bloomberg BNA, *Bloomberg BNA Launches FLSA Litigation Tracker* (Jan. 12, 2012) (quoting a senior publishing executive as saying that, "[w]ith all signs pointing to the recent boom in FLSA litigation continuing in the near future, the need for [the new service] has never been more urgent").

ney's fees in private ERISA actions); 33 U.S.C. § 1365(d) (Clean Water Act); *and* 42 U.S.C. § 1988(b) (private actions under various civil rights statutes); *see also* Fed. R. Civ. P. 23(h) (explaining that district courts in certified class actions "may" award attorney's fees if authorized to do so by law or by the parties' agreement). The FLSA's mandatory attorney's fee provision creates a significant financial incentive for plaintiff's counsel to litigate FLSA cases rather than resolve them on reasonable terms. In fact, it is not uncommon for attorney's fees and costs to dwarf the amount of wages at issue in FLSA cases. *See, e.g.*, *Perrin v. John B. Webb & Assocs.*, No. 6:04-cv-399, 2005 WL 2465022, at *5 (M.D. Fla. Oct. 6, 2005) (awarding over $7,700 in attorney's fees and costs even though underlying claim was for wages totaling $270).

Second, the FLSA is a strict-liability statute whose sweep is still largely unresolved. For example, the question whether certain employees are exempt from the statute's requirements has been a hotly contested issue, which has been aggravated by recent shifts in the Department of Labor's interpretation of the statute. *See, e.g.*, *SmithKline Beecham Corp. v. Christopher*, 635 F.3d 383, 390-95 (9th Cir.) (describing regulatory changes promulgated by the Department in 2004 and refusing to give deference to interpretation of same contained in the Department's *amicus* brief), *cert. granted*, 132 S. Ct. 760 (2011). Because the FLSA has no intent element, an employer's good-faith belief that it has complied with the statute serves only as a limited defense if subsequent judicial decisions or regulations interpret the statute differently. *See* 29 U.S.C. §§ 255(a), 260

(providing that employer's intent affects statute of limitations and award of double damages, not attorney's fees).

Regardless of the reason, the practical reality is that putative collective actions under the FLSA impose significant costs on employers of every size and in every segment of the national economy. A review of the Department of Labor's website reveals the staggering breadth and diversity of the FLSA's coverage. *See* U.S. Dep't of Lab., *Topical Fact Sheet Index*, http://www.dol.gov/whd/fact-sheets-index.htm (last visited Mar. 21, 2012) (listing separate FLSA "fact sheets" targeting employers and employees in such diverse industries as agriculture, amusement parks, automobile dealerships, call centers, car washes, construction, daycare, firefighting, grocery stores, home health care, insurance, law enforcement, lodging, lifeguarding, maintenance, manufacturering, nursing, real estate, retail, roofing, state government, transportation, warehousing, and wholesaling).

The FLSA's collective-action device allows plaintiff's counsel to leverage easily a lawsuit involving a single claim into a lawsuit of nationwide scope involving tens of thousands of claims. Once that occurs, the pressure on employers to settle is so great that it is the rare case that produces a trial, let alone an appeal of a final judgment entered after trial. As one witness recently explained in testimony before Congress, "when you look at the threat of these lawsuits and you understand the risks of going to trial, decisions are made on a business level to make payments that are dramatic compromises . . . ." *House Hearing* at 52 (statement of Richard L. Alfred); *see*

also id. at 29 (cataloging recent settlements ranging from $38 million to $135 million in suits brought against employers in the financial-services, insurance, retail, and technology industries).

This phenomenon exists regardless of whether an FLSA violation actually occurred. As the same witness also explained:

> If one were to examine the way a collective action works under the [FLSA], one would quickly see that the risks to employers may be enormous. That doesn't mean that employers did anything wrong. Oftentimes, the analysis is that they did not. The problem is, in a collective action, the case may be what is called conditionally certified at the very beginning of the lawsuit with a very low burden. Almost all cases are. That then triggers legal mechanisms that allow the hundreds, thousands, and more people to join the case.

House Hearing at 51 (statement of Mr. Alfred).

The Third Circuit's decision therefore deprives employers of a reasonable means to avoid burdensome litigation by offering complete relief to the only party before the court claiming injury, all for the policy-based reason of promoting private enforcement of the FLSA. Article III, however, does not permit the continuation of litigation based solely on speculation that further discovery and litigation might generate new cases or controversies involving parties not presently before the court.

Finally, the current disagreement in the circuits promotes forum shopping. The FLSA provides that an employee may file suit in "any" federal court of "competent jurisdiction." 29 U.S.C. § 216(b). This statutory language gives plaintiff's counsel signifi-

cant discretion in choosing where to file suit. This is particularly true of FLSA suits brought against employers that, like the employers here, operate in multiple States. *See* Am. Compl. ¶¶ 1, 12, 19, *Symczyk v. Genesis HealthCare Corp.*, No. 2:09-cv-05782 (E.D. Pa. Apr. 23, 2010) (ECF No. 22) (styling this case as a "nationwide collective action" involving 36,000 employees in thirteen States). Savvy plaintiff's counsel will therefore choose to file suit in those circuits with favorable mootness precedent and avoid those circuits with unfavorable mootness precedent.

As a result, further percolation of the question presented will likely prove of little benefit to the Court, nor is it likely that those circuits that have decided the issue will change course. Further percolation is also unlikely to be of benefit to the Court since the origin of the present controversy lies in statements made by the Court thirty-two years ago in *Roper* and *Geraghty*. Only the Court can resolve such a controversy.

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted and the judgment of the court of appeals reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

ON FILED

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No. 11-1059

IN THE

Supreme Court of the United States

GENESIS HEALTHCARE CORPORATION, *ET AL.*,
Petitioners,

v.

LAURA SYMCZYK,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION OF DRI—THE VOICE OF THE DEFENSE BAR FOR LEAVE TO FILE AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF DRI—THE VOICE OF THE DEFENSE BAR FOR LEAVE TO FILE AS *AMICUS CURIAE*

Pursuant to this Court's Rule 37.2(b), DRI—The Voice of the Defense Bar moves for leave to file the accompanying brief as *amicus curiae* in support of petitioners. Counsel for petitioners has consented to the filing of this brief and that consent has been lodged with the Clerk. Counsel for respondent has withheld consent.

Amicus curiae is the leading organization of defense attorneys and in-house counsel involved in the defense of civil litigation. DRI provides members with access to resources and tools to enable them to provide high-quality, balanced, and excellent service to their clients and corporations. DRI is host to more than 25 substantive committees whose focus is to develop ongoing and critical dialogue about areas of practice. For the past 50 years, DRI has sought to enhance the skills, effectiveness, and professionalism of defense lawyers; anticipate and address issues germane to defense lawyers and the civil justice system; promote appreciation of the role of the defense lawyer; improve the civil justice system; and preserve the civil jury.

This case concerns whether a lawsuit can proceed—whether it continues as a live case or controversy within the judicial power of Article III—after the lone plaintiff has lost any financial or other legally cognizable interest in any judgment that might result. The decision below answered that question in the affirmative, allowing a suit to proceed under the collective-action provision of the Fair Labor Standards Act (FLSA) after the plaintiff lost her personal stake in the outcome.

DRI has a significant interest in the resolution of that question. DRI's members routinely defend clients in col-

lective litigation across the Nation, whether under the FLSA, Rule 23, or other applicable statutes. In view of its broad membership and their experience in such matters, DRI has a unique perspective and insight into the issue. DRI regularly participates as *amicus curiae* before this Court on issues of collective litigation and the need for uniform rules. See, *e.g.*, *Ticketmaster* v. *Stearns* (No. 11-983); *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011).

DRI, its members, and the clients its members represent also have an ongoing interest in ensuring that federal courts confine themselves to their constitutionally appointed role of adjudicating live cases and controversies between actual parties. In *amicus*'s view, allowing lawsuits to proceed absent a live controversy between identifiable parties, as the Third Circuit did below, is incompatible with basic principles of fairness and is inconsistent with the judiciary's role in our system of government. And the ruling below has a broad impact. It affects myriad cases under the FLSA: In the 12-month period from 2010 to 2011, "[t]he number of FLSA cases filed in federal court * * * increased more than 15 percent," and "[t]he majority of the cases are collective actions." Shannon Green, *Wage and Hour Litigation is Big—and Getting Bigger*, Corp. Counsel, Mar. 19, 2012, http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202546026856. The decision below will also govern suits brought under various other statutes that incorporate the FLSA's collective-action provision. See, *e.g.*, 29 U.S.C. §626(b) (Age Discrimination in Employment Act). And it has implications for proper application of the case or controversy requirement in numerous other contexts. DRI's experience in studying and litigating these issues allows it to provide a unique perspective to this Court.

For the foregoing reasons, the motion of DRI—The Voice of the Defense Bar for leave to file the accompanying brief as *amicus curiae* should be granted.

Respectfully submitted.

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MARCH 2012

QUESTION PRESENTED

Whether a case becomes moot, and thus beyond the judicial power of Article III, when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff's claims.

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IN THE

Supreme Court of the United States

No. 11-1059

GENESIS HEALTHCARE CORPORATION, *ET AL.*,
Petitioners,
v.
LAURA SYMCZYK,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI—The Voice of the Defense Bar is the leading organization of defense attorneys and in-house counsel involved in the defense of civil litigation. DRI provides members with access to resources and tools to enable attorneys to provide high-quality, balanced, and excellent service to their clients and corpora-

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

tions. DRI is host to more than 25 substantive committees whose focus is to develop ongoing and critical dialogue about areas of practice. For the past 50 years, DRI has sought to enhance the skills, effectiveness, and professionalism of defense lawyers; anticipate and address issues germane to defense lawyers and the civil justice system; promote appreciation of the role of the defense lawyer; improve the civil justice system; and preserve the civil jury.

This case concerns whether a lawsuit can proceed—whether it continues as a live case or controversy within the judicial power of Article III—after the lone plaintiff loses any financial or other legally cognizable interest in any judgment that might result. The decision below answered that question in the affirmative, allowing a suit to proceed under the collective-action provision of the Fair Labor Standards Act (FLSA) even after the plaintiff lost any personal stake in the outcome. Indeed, the decision allowed the case to proceed even though there is no longer any plaintiff with a personal stake of any sort in the outcome.

That ruling is of great concern to DRI, its members, and the clients they represent. DRI's members routinely defend clients in collective litigation across the Nation, whether under the FLSA, Rule 23, or other applicable statutes. DRI, moreover, regularly participates as *amicus curiae* before this Court on issues of collective litigation and the need for uniform rules. See, *e.g.*, *Ticketmaster* v. *Stearns* (No. 11-983); *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011). DRI, its members, and the clients its members represent also have an ongoing interest in ensuring that federal courts confine themselves to their constitutionally appointed role of adjudicating live cases and controversies between actual parties.

In *amicus*'s view, allowing lawsuits to proceed absent a live controversy between identifiable parties is incompatible with basic principles of fairness and is inconsistent with the judiciary's role in our system of government. It cannot be reconciled with the principle that actual plaintiffs, not clientless attorneys, should drive litigation. And the ruling has a broad impact. It affects myriad cases under the FLSA: In the 12-month period from 2010 to 2011, "[t]he number of FLSA cases filed in federal court * * * increased more than 15 percent," and "[t]he majority of the cases are collective actions." Shannon Green, *Wage and Hour Litigation is Big—and Getting Bigger*, Corp. Counsel, Mar. 19, 2012, http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202546026856. The decision below will also govern suits brought under various other statutes that incorporate the FLSA's collective-action provision. See, *e.g.*, 29 U.S.C. §626(b) (Age Discrimination in Employment Act). And the decision's ramifications extend beyond collective-action cases; it has broad implications for class actions and other representative actions, promoting clientless, attorney-driven litigation in those other contexts as well. In view of the profound issues it raises for DRI and its members, DRI urges that the petition be granted.

REASONS FOR GRANTING THE PETITION

The decision below implicates the most fundamental limit on federal judicial power under Article III—the requirement of a live case or controversy between parties with opposing personal stakes in the litigation. "Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them,' and confines them to resolving 'real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an

opinion advising what the law would be upon a hypothetical state of facts.'" *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971)). It thereby ensures that federal courts do not invade the province of the legislature by pronouncing unnecessarily on questions of policy or otherwise becoming arbiters in abstract debates. By restricting the judiciary to "the traditional role of Anglo-American courts," the requirement of a live controversy between concrete parties preserves "'the proper—and properly limited—role of the courts in a democratic society.'" *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 492-493 (2009).

The decision below cannot be reconciled with those principles. There is no dispute that respondent lost any concrete interest in this suit after petitioners made her an offer of judgment in full. Nor is there any other plaintiff in this action for whom the controversy remains live and concrete. To the contrary, the FLSA's collective-action provision makes it clear that one cannot become an FLSA plaintiff except by affirmatively opting in: "No employee shall be a party plaintiff to any such action," the FLSA provides, "unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. §216(b). Because no one has done so, when respondent lost her personal stake in the outcome of this litigation, the case became moot: The court could afford respondent nothing more than she had voluntarily been offered. But the decision below allowed the plaintiffless suit to proceed nonetheless.

That decision has grave implications for defendants and the judicial system. It permits representative actions to proceed, headed not by an actual plaintiff with a

concrete interest, but instead by clientless lawyers seeking a judgment for as-yet-unidentified persons. It deepens a circuit split. The Fifth Circuit, like the Third Circuit here, has held that suits like this one may proceed even after the sole plaintiff loses any personal stake in the outcome of the case. By contrast, the Ninth and Eleventh Circuits have held that such cases are moot. The conflicting rulings have, moreover, resulted in disarray in the district courts. This Court should grant the petition, restore uniformity, and reaffirm that federal courts' proper role is to resolve actual cases or controversies between parties with personal stakes in the outcome—as opposed to arbitrating abstract disputes pursued by counsel years after their client has lost any concrete interest in the outcome.

I. This Court's Review Is Needed To Ensure That The Exercise Of The Federal Judicial Power Remains Confined To Actual Controversies

The defining feature of the judicial power is that it is limited to live cases and controversies between parties with opposing personal stakes in the outcome. The decision in this case eliminates that requirement for a broad swath of cases, allowing them to proceed long after the sole plaintiff has lost any concrete interest in any relief a court might offer. This Court's intervention is required to restore the federal courts to their proper, and properly limited, role.

A. Article III Requires A Live Controversy Between Parties With Personal Stakes In The Outcome

Article III of the U.S. Constitution limits the jurisdiction of federal courts to the resolution of "Cases" and "Controversies"—the sorts of disputes traditionally ad-

judicated by Anglo-American courts. See U.S. Const. art. III, §2. Because of that limitation on federal judicial authority, litigants must "demonstrate a 'personal stake' in the suit." *Camreta* v. *Greene*, 131 S. Ct. 2020, 2028 (2011); see also *Summers*, 555 U.S. at 493. The party invoking the Court's authority must not merely have "suffered an injury in fact" that was caused by "the conduct complained of"; she must also show that the injury "will be redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992) (quotation marks omitted). Those requirements also ensure that the controversy features "that concrete adverseness which sharpens the presentation of issues." *Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983) (quotation marks omitted).

That requirement of a live controversy persists throughout the case. *Lewis*, 494 U.S. at 477. "[I]t is not enough that a dispute was very much alive when suit was filed." *Ibid.* Rather, the "case-or-controversy requirement subsists through *all stages* of federal judicial proceedings, trial and appellate." *Ibid.* (emphasis added); *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997); *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975).

If a case ceases to be "alive" at some point during litigation, it is moot and can no longer proceed. *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998); see also *S. Spring Hill Gold Mining Co.* v. *Amador Medean Gold Mining Co.*, 145 U.S. 300, 301 (1892) (stating that, when "litigation has ceased to be between adverse parties, * * * the case * * * is not a real one"). Likewise, where intervening circumstances deprive the plaintiff of a "'personal stake in the outcome' of the lawsuit," the suit is also moot. *Lewis*, 494 U.S. at 478 (quoting *Lyons*, 461 U.S. at 101); see, *e.g.*, *Spencer*, 523 U.S. at 7; *Preiser*, 422 U.S. at 401; *Mills* v.

Green, 159 U.S. 651, 653 (1895). The requirement of a live controversy between parties with personal stakes in the outcome, like other justiciability doctrines, "state[s] fundamental limits on federal judicial power in our system of government." *Allen* v. *Wright*, 468 U.S. 737, 750 (1984). Federal courts do not merely "lack jurisdiction to decide moot cases," *Iron Arrow Honor Society* v. *Heckler*, 464 U.S. 67, 70 (1983); they exceed their constitutional authority under our tripartite system of government when they attempt to do so.[2]

B. Plaintiffless Lawsuits Like Respondent's Defy Article III

The decision below defies those principles. Respondent filed suit under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§207 and 216(b), on behalf of herself and all others similarly situated, alleging that her employer forced its employees to take automatic meal-break salary deductions. Pet. App. 2a-3a. Under the FLSA's collective-action provision, however, respondent remained the sole and exclusive plaintiff. The FLSA declares that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. §216(b). Here, it is uncontested that no other employee gave the neces-

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[2] See, *e.g.*, *Spencer*, 523 U.S. at 7; *Honig* v. *Doe*, 484 U.S. 305, 317 (1988); *id.* at 332-333 (Scalia, J., dissenting); *DeFunis* v. *Odegaard*, 416 U.S. 312, 316 (1974); *Preiser*, 422 U.S. at 401; *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964); see also *Eisler* v. *United States*, 338 U.S. 189, 194 (1949) (Murphy, J., dissenting); *California* v. *San Pablo & Tulare R.R. Co.*, 149 U.S. 308, 314 (1893) ("[T]he court is not empowered to decide moot questions or abstract propositions, or to declare * * * principles or rules of law which cannot affect the result as to the thing in issue in the case before it.").

sary consent to become a party to respondent's lawsuit. Pet. App. 3a.

Two months into this action, petitioners offered the plaintiff a judgment that would provide her with all of the relief she sought. Pet. App. 3a-4a; see Fed. R. Civ. P. 68(a). Respondent "did not dispute the adequacy of the offer as it pertained to the value of her individual claim." Pet. App. 20a n.9. Nor does respondent seek injunctive or declaratory relief that could affect her future working conditions; she does not work for petitioners. See *id.* at 3a. It is thus indisputable that she has nothing to gain from this litigation. As a result, because the sole plaintiff no longer has a "'personal stake in the outcome' of the lawsuit," *Lewis*, 494 U.S. at 478, it no longer presents a case or controversy.

The court below allowed the case to proceed nonetheless on the theory that *other* persons might *later* decide to become parties, reviving the now-expired controversy. But the supposition that another plaintiff might later inject herself into the case cannot circumvent the requirements of Article III. "Federal courts must hesitate before resolving a controversy * * * on the basis of the rights of third persons not parties to the litigation." *Singleton* v. *Wulff*, 428 U.S. 106, 113 (1976). And when those non-parties possess the *only* rights to be adjudicated, that hesitancy becomes a categorical bar: "[F]ederal courts are *without power* to decide questions that cannot affect the rights of litigants in the case before them." *Rice*, 404 U.S. at 246 (emphasis added).

The potential for other persons to later decide to become parties does not vitiate the strictures of Article III's mootness bar. "This Court does not sit here to try moot cases to solve a question which may never be raised by any party entitled to raise it." *Waite* v. *Dowley*, 94

U.S. 527, 534 (1877). And "the Article III question is not whether the requested relief would be nugatory as to the world at large, but whether [*the plaintiff*] has a stake in that relief." *Lewis*, 494 U.S. at 479. The mere ability of others to opt in, moreover, "is not an indication of the intent to do so, and thus does not establish a particularized, concrete stake that would be affected by [a court's] judgment." *Ibid.* Respondent thus seeks to rely, not on her own interest in the case, but on the putative interest of persons who are not before the court—and may never be.

Relying on the possibility that non-parties might become plaintiffs at some uncertain future date is inconsistent with our adversarial system of justice. In our system, cases and controversies are between actual plaintiffs and actual defendants. The court of appeals, however, effectively ruled that having an actual, identifiable plaintiff is unnecessary. Instead, it converted the complainant's side of the "v." into a mere placeholder that could be filled at some later date by an as-yet-unidentified individual of the plaintiffs'-side lawyers' choosing. But a lawsuit is not supposed to be a blank dance card into which one can substitute a rotating roster of parties. It is supposed to be an actual dispute between existing parties. If there is no plaintiff, there is no lawsuit; if a new plaintiff comes forth, she should file a new lawsuit.

The decision in this case, moreover, reflects an increasing tendency to treat lawsuits as having a life separate from the parties that bring them. The desire to do so in longstanding controversies may be understandable. This Court has recognized the "sunk costs" imposed on the judiciary once a "case has been brought and litigated." *Friends of Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191-192 & n.5 (2000). But this case takes that understandable desire to avoid sunk costs

to an illogical extreme. In this case, the offer of judgment that denied the sole plaintiff any continued interest in the suit was made years ago, just two months after respondent filed her complaint, Pet. App. 3a-4a; contrast *Laidlaw*, 528 U.S. at 191 ("[B]y the time mootness is an issue, the case has been brought and litigated, often (as here) for years."). In any event, "[t]his argument from sunk costs does not license courts to retain jurisdiction over cases in which one or both of the parties plainly lack a continuing interest." *Laidlaw*, 528 U.S. at 192. The decision below, and others like it, cannot be reconciled with that principle.

II. Absent Review, Lower Courts Will Continue To Apply This Court's Precedents Inconsistently

The Third Circuit's decision in this case does not reflect an isolated departure from the Constitution's requirement of a live case or controversy between parties with concrete interests. It reflects one side of a well-developed split in the courts of appeals. Relying on this Court's class-action precedents—which permit a putative class representative to appeal denial of class certification even after her individual claim has become moot—several lower courts have allowed FLSA suits to proceed on behalf of unnamed individuals even after the actual plaintiff's personal stake in any resulting judgment has disappeared. That not only defies Article III's case-or-controversy requirement. It also reflects a misunderstanding of this Court's precedents.

This Court has allowed class representatives to proceed with a case despite questions about their continued personal stake on the theory that they retain a pecuniary interest in sharing costs with unnamed class members or a procedural interest in serving as a class representative.

This Court has also suggested that unnamed class members with live claims arguably are "parties" for Article III purposes. But whatever force those rationales have in the class-action context, they cannot logically be extended to this case. An FLSA plaintiff whose own claims have become moot has no comparable interests. Indeed, deliberately designed as a contrast to ordinary class-action mechanisms, the FLSA's collective-action provision expressly provides that potential plaintiffs *are not parties until they opt in* to the lawsuit by written consent. Absent such consent, there is no arguable party other than the named plaintiff who might keep the suit alive. And respondent herself lacks even the collateral interests that this Court has found putative class representatives to possess.

A. Lower Courts Addressing The FLSA's Opt-In Provision Are In Disarray

Over three decades ago, this Court ruled (in two cases decided on the same day) that a putative class representative may appeal a district court's denial of class certification after the representative's own individual claim becomes moot. See *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326 (1980); *U.S. Parole Comm'n* v. *Geraghty*, 445 U.S. 388 (1980). In *Roper*, the Court concluded that named plaintiffs in a suit under the National Bank Act, whose personal claims were mooted after the district court denied certification, could still appeal the denial. 445 U.S. at 340. And in *Geraghty*, the Court concluded that a prisoner who brought a putative class action challenging parole release guidelines could appeal the denial of class certification even after he was released. 445 U.S. at 405-407.

Lower courts are in disarray as to whether *Roper* and *Geraghty* can be extended to collective actions under the

FLSA, so as to permit an action to proceed after the named plaintiff no longer has a personal stake in the case. See Pet. 14-19. Notwithstanding the FLSA's express declaration that no one may be deemed a plaintiff unless they expressly choose to become one, the decision below held such actions can proceed. See Pet. App. 15a-17a, 21a-25a. The Fifth Circuit did as well. See *Sandoz* v. *Cingular Wireless LLC*, 553 F.3d 913, 922 (5th Cir. 2008). By contrast, the Ninth and Eleventh Circuits have concluded that a claim may not proceed once the only plaintiff no longer has a personal stake in the outcome of the case. See *Smith* v. *T-Mobile USA, Inc.*, 570 F.3d 1119, 1122-1123 (9th Cir. 2009); *Cameron-Grant* v. *Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1245-1249 (11th Cir. 2003). The petition thus presents a clear split of authority among the courts of appeals.

The disarray is not limited to the courts of appeals. It also extends to district courts. Numerous district courts have concluded that a plaintiff's loss of a cognizable interest in any resulting judgment moots an FLSA collective action.[3] Other district courts, however, have concluded to the contrary.[4] The outcome of a federal claim

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[3] See, *e.g.*, *Louisdor* v. *Am. Telecomms., Inc.*, 540 F. Supp. 2d 368, 373-374 (E.D.N.Y. 2008); *Darboe* v. *Goodwill Indus. of Greater N.Y. & N. N.J., Inc.*, 485 F. Supp. 2d 221, 224 (E.D.N.Y. 2007); *Ward* v. *Bank of N.Y.*, 455 F. Supp. 2d 262, 267 (S.D.N.Y. 2006); *Rollins* v. *Sys. Integration, Inc.*, No. 05-408, 2006 WL 3486781, at *5 (N.D. Tex. Dec. 4, 2006); *Briggs* v. *Arthur T. Mott Real Estate LLC*, No. 06-0468, 2006 WL 3314624, at *4 (E.D.N.Y. Nov. 14, 2006); *Vogel* v. *Am. Kiosk Mgmt.*, 371 F. Supp. 2d 122, 126-128 (D. Conn. 2005); *Taylor* v. *CompUSA, Inc.*, No. 04-718, 2004 WL 1660937, at *2 (N.D. Ga. July 14, 2004); *Mackenzie* v. *Kindred Hosps. E., L.L.C.*, 276 F. Supp. 2d 1211, 1216-1217 (M.D. Fla. 2003).

[4] See, *e.g.*, *Bowens* v. *Atl. Maint. Corp.*, 546 F. Supp. 2d 55, 79 (E.D.N.Y. 2008) (noting that there "may be [a] lone plaintiff," but stating that the FLSA action was not moot because "other individu-

should not turn on the happenstance of the district or circuit in which the suit is filed. Given the disparate results in different courts, this Court's review is warranted.

B. Lower Court Decisions Misconstrue This Court's Precedents As Authorizing Departure From The Case-Or-Controversy Requirement

Review is warranted for a second reason as well. Decision after decision has undermined the constitutional case-or-controversy requirement by transplanting narrow exceptions, which are limited to certain class-action contexts, into new areas like the FLSA. Those extensions of *Roper* and *Geraghty* overlook the essential differences between opt-out class actions and opt-in FLSA collective actions.

1. In *Roper* and *Geraghty*, this Court concluded that a class-action lawsuit may survive as a live controversy for two distinct reasons. *Roper* states that the named plaintiffs could retain a personal stake "in their desire to shift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails." 445 U.S. at 336. And in *Geraghty*, this Court stated that, even "after the [named plaintiff's] claim on the merits 'expires,'" he may retain a personal stake in "the claim that he is entitled to represent a class." 445 U.S. at 402.

Roper and *Geraghty*, however, both arose in the Rule 23 class-action context. As this Court has explained, an Article III "controversy" exists "between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named

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als were *interested* in joining" (emphasis added)); *Roble* v. *Celestica Corp.*, 627 F. Supp. 2d 1008, 1013 (D. Minn. 2007); *Morales-Arcadio* v. *Shannon Produce Farms*, 237 F.R.D. 700, 702 (S.D. Ga. 2006).

plaintiff has become moot." *Sosna* v. *Iowa*, 419 U.S. 393, 402 (1975). Likewise, this Court has held that unnamed class members resemble parties in certain respects even before a class is certified. The filing of a class action, for example, "tolls the statute of limitations as to all asserted members of the class," even if unnamed class members are unaware of the suit and even if certification is later denied. *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 350 (1983) (quotation marks omitted); see also *Am. Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 553-554 (1974). That policy is based on pragmatic concerns: "Otherwise, all class members would be forced to intervene to preserve their claims." *Devlin* v. *Scardelletti*, 536 U.S. 1, 10 (2002); see also *id.* at 9-10 ("Nonnamed class members * * * may be parties for some purposes and not for others."). It also reflects the class action's "inherent representativeness," which "means that each putative class member has effectively been a party to the action" since the complaint's filing. *State Farm Mut. Auto. Ins. Co.* v. *Boellstorff*, 540 F.3d 1223, 1232-1233 (10th Cir. 2008) (quotation marks omitted).

Unnamed class members thus take on some of the characteristics of traditional parties. Consistent with that view, this Court has at times referred to unnamed members as "parties in interest," *Smith* v. *Swormstedt*, 57 U.S. 288, 303 (1854), "interested parties," *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356, 366 (1921), and "absent parties," *Hansberry* v. *Lee*, 311 U.S. 32, 42-45 (1940). See *Roper*, 445 U.S. at 343 n.3 (Stevens, J., concurring) (noting these examples). Indeed, Justice Stevens went so far as to argue that, "when a proper class action complaint is filed, the absent members of the class should be considered parties to the case or controversy at

least for the limited purpose of the court's Art. III jurisdiction." *Id.* at 342 (Stevens, J., concurring).

As a corollary, named plaintiffs "have fiduciary duties towards the other members of the class." *Martens* v. *Thomann*, 273 F.3d 159, 173 n.10 (2d Cir. 2001); *Crawford* v. *Equifax Payment Servs., Inc.*, 201 F.3d 877, 880 (7th Cir. 2000); *Sondel* v. *Nw. Airlines, Inc.*, 56 F.3d 934, 938-939 (8th Cir. 1995). They must "represent the collective interests of the putative class" in addition to their own interests, *Roper*, 445 U.S. at 331; see also Fed. R. Civ. P. 23(a)(4), and named and unnamed members of a certified class are bound by any resulting judgment, *Cooper* v. *Fed. Reserve Bank*, 467 U.S. 867, 874 (1984).

2. Whatever the ongoing vitality of those class-action precedents, they cannot be extended beyond their limited foundations—and they certainly cannot be extended to the FLSA. Unlike *Roper*, respondent here has no interest in sharing costs with other employees; petitioners offered to pay her costs and fees in full. Pet. App. 3a-4a. Unlike *Geraghty*, a named plaintiff has no procedural interest in representing other employees; an FLSA plaintiff "does not have a procedural right to represent a class in the absence of any opt-in plaintiffs." *Smith* v. *T-Mobile USA Inc.*, 570 F.3d 1119, 1122 (9th Cir. 2009). And unlike Rule 23, the FLSA creates a "collective action" under which no one is, or becomes, a "party" unless they consent to become one. 29 U.S.C. §216(b). Thus, respondent has no interest in the litigation's outcome.

Nor do unnamed, unidentified employees have a status under the FLSA that even remotely resembles those of parties (or unnamed class members). Congress designed the FLSA's collective-action mechanism to *distinguish* collective suits under the FLSA from class actions and to prevent a flood of suits: "In 1938, Congress gave em-

ployees and their 'representatives' the right to bring actions to recover amounts due under the FLSA." *Hoffmann-LaRoche, Inc.* v. *Sperling*, 493 U.S. 165, 173 (1989). "No written consent requirement of joinder was specified by the statute." *Ibid.* The ease with which suits could be brought led to "a flood of suits under the FLSA." *Arrington* v. *Nat'l Broad. Co.*, 531 F. Supp. 498, 500 (D.D.C. 1982). For example, "[i]n the seven-month period from July 1, 1946 to January 31, 1947, 1,913 * * * cases were filed in the federal courts," and most "involved very large allegations of liability." *Id.* at 500 n.5 (citing 93 Cong. Rec. 2087-2088 (1947) (remarks of Senator Donnell)).

Less than a decade later, Congress fixed the problem. Because of "excessive litigation spawned by plaintiffs lacking a personal interest in the outcome, the representative action by plaintiffs not themselves possessing claims was abolished, and the requirement that an employee file a written consent was added." *Hoffmann-LaRoche*, 493 U.S. at 173. The result of that 1947 amendment was to "limit[ ] private FLSA plaintiffs to employees who asserted claims in their own right and free[ ] employers of the burden of representative actions." *Ibid.*; see also *Cameron-Grant*, 347 F.3d at 1248. The opt-in provision thus sought to "prevent large group actions, with their vast allegations of liability, from being brought on behalf of employees who had no real involvement in, or knowledge of, the lawsuit." *Arrington*, 531 F. Supp. at 501.

The differences between opting in under the FLSA and the Rule 23 class action render the two mechanisms "mutually exclusive and irreconcilable." *LaChapelle* v. *Owens-Illinois, Inc.*, 513 F.2d 286, 289 (5th Cir. 1975). Although members of an uncertified class might be con-

sidered "parties for some purposes," *Devlin*, 536 U.S. at 9-10, the FLSA's text forecloses that treatment of potential collective-action plaintiffs: "*No employee shall be a party plaintiff* to any such action unless he gives his consent in writing." 29 U.S.C. §216(b) (emphasis added).

Other aspects of the collective-action device confirm that categorically different approach. Under the FLSA, non-parties do not have their claims tolled when a named plaintiff files a complaint. See 29 U.S.C. §256(a)-(b). Nor are non-parties bound by the outcome of any FLSA suit. And far from owing any fiduciary duties toward non-parties, a named FLSA plaintiff "has no independent right to represent a class that would preserve a personal stake in the outcome for jurisdictional purposes; his right to represent a class depends entirely on whether other plaintiffs have opted in." *Smith*, 570 F.3d at 1123. The opt-in mechanism under the FLSA is thus "a fundamentally different creature than the Rule 23 class action." *Cameron-Grant*, 347 F.3d at 1249; see *LaChapelle*, 513 F.2d at 288 (describing the "fundamental, irreconcilable difference" between the two mechanisms).

Despite those fundamental differences, the decision below superimposed the mootness doctrine as it is applied to class actions onto the FLSA's opt-in provision. See Pet. App. 11a-14a, *id.* at 21a-27a. The Fifth Circuit has likewise stated that the differences between the two mechanisms "do not compel a different result." *Sandoz*, 553 F.3d at 920. But those statements defy the foundations of *Roper* and *Geraghty*. And they ignore the pragmatic rationales underpinning the effort to relax, in the limited context of class actions, the traditional requirement that the actual plaintiff have an ongoing and concrete interest in the judgment. Absent class members, for example, may have sufficient interests, and may be

sufficiently like actual parties, to prevent mootness. The same thing cannot be said of as-yet-unidentified employees who, by statute, are not parties unless they elect in writing to become parties, who have not so elected, and who are as a result not affected by any judgment in the case. Consequently, when the only identifiable plaintiff's claims become moot, so too does the case; no plaintiff with a live claim remains before the court.[5] The Third Circuit's contrary ruling warrants review.

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[5] Nor do any of this Court's other narrowly crafted exceptions to mootness apply to plaintiffless FLSA suits. A case might not be moot if it is "capable of repetition, yet evading review." *Honig*, 484 U.S. at 318 (quotation marks omitted). Under that exception, a case is justiciable if "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975). But allegations of FLSA violations will rarely meet this exception. Here, for example, respondent alleged that a company policy violated the law. Pet. App. 3a. And a case might not be moot upon "a defendant's voluntary cessation of a challenged practice" because the defendant would be "free to return to his old ways." *Laidlaw*, 528 U.S. at 189 (quotation marks omitted). But here, respondent challenges a policy rather than fleeting alleged behavior. Finally, a case challenging the validity of a criminal sentence might not be moot if there is "some concrete and continuing injury other than the now-ended incarceration or parole—some 'collateral consequence' of the conviction." *Spencer*, 523 U.S. at 7. That exception obviously has no application here. In short, because this plaintiffless suit neither satisfies the mootness doctrine's requirements nor meets any of that doctrine's exceptions, it presents no Article III case or controversy.

C. Lower Courts Inconsistently Apply *Roper* And *Geraghty* To Named Representatives Whose Claims Have Become Moot Before A Class Certification Motion Has Been Filed

The current controversy has ramifications that extend well beyond the FLSA and similar statutes. It has profound implications for pre-certification putative class actions as well. While the interests of absent class members may arguably be sufficient to prevent a class action from becoming moot notwithstanding extinguishment of the named representative's claims, the lower federal courts are divided over the circumstances that will support that result. That division reflects broader disagreement over the scope and meaning of *Roper* and *Geraghty*—issues that a decision in this case would resolve.

1. Although *Roper* and *Geraghty* are now three decades old, lower federal courts increasingly struggle to define their scope. For example, some courts, like the Seventh Circuit, hold that a putative class action cannot continue if the named plaintiff loses her personal stake in the case before any class certification motion is filed.[6] Other circuits have ruled the opposite way, permitting a case to continue even if a putative class representative loses her interest in the outcome early in the case, before a class certification motion is filed.[7] More broadly, courts

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[6] See *Damasco* v. *Clearwire Corp.*, 662 F.3d 891, 895 (7th Cir. 2011) ("[A] plaintiff cannot avoid mootness by moving for class certification after receiving an offer of full relief.").

[7] See *Pitts* v. *Terrible Herbst, Inc.*, 653 F.3d 1081, 1091-1092 (9th Cir. 2011) ("[A]n unaccepted Rule 68 offer of judgment—for the full amount of the named plaintiff's individual claim and made before the named plaintiff files a motion for class certification—does not moot a class action."); *Weiss* v. *Regal Collections*, 385 F.3d 337, 348 (3d Cir. 2004) ("Absent undue delay in filing a motion for class certification

are in disagreement over whether a plaintiff who loses a cognizable interest in any resulting judgment prior to class certification may proceed with the lawsuit.[8] As these cases demonstrate, the relationship between pre-certification putative class actions and mootness is unsettled at best.

A decision in this case has the potential to provide much-needed guidance in this unsettled area of law. The uncertainty about the scope of *Roper* and *Geraghty*—whether they apply in class actions before the class certification motion has been filed or, in this case, to FLSA actions before anyone else has met the statutory requirement of consenting to become a party—reflects controversy about the meaning of those decisions and their consistency with this Court's more recent (and more demanding) case-or-controversy precedents. A decision in this case would go a great distance to clarifying the current boundaries of *Roper* and *Geraghty*. This Court has recently announced that an "unnamed member of a pro-

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* * * where a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint.").

[8] Compare, *e.g.*, *Damasco*, 662 F.3d at 895 ("[W]e have long held that a defendant cannot moot a case by making an offer *after* a plaintiff moves to certify a class."), and *Lucero* v. *Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1249-1250 (10th Cir. 2011), with *Cruz* v. *Farquharson*, 252 F.3d 530, 533 (1st Cir. 2001) ("Despite the fact that a case is brought as a putative class action, it ordinarily must be dismissed as moot if no decision on class certification has occurred by the time that the individual claims of all named plaintiffs have been fully resolved."). Cf. *Fox* v. *Bd. of Trs. of State Univ. of N.Y.*, 42 F.3d 135, 144 (2d Cir. 1994) (denying named plaintiffs' leave to amend class-action complaint to add another plaintiff, "conclud[ing] that once a case is moot, it is no longer justiciable in federal court and must be dismissed").

posed but uncertified class" generally does not "qualif[y] as a party" subject to a federal court's jurisdiction. *Smith* v. *Bayer Corp.*, 131 S. Ct. 2368, 2379 (2011); *id.* at 2381 n.11 ("an uncertified class action cannot bind proposed class members").[9] This Court should likewise make it clear here that the interests of non-parties—and of individuals who lack specifically identified essential attributes of parties—cannot provide the sole basis for the case or controversy necessary to establish Article III jurisdiction.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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MARCH 2012

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[9] See also *Sosna*, 419 U.S. at 399 ("When the District Court *certified the propriety of the class action*, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant." (emphasis added)); *Bd. of Sch. Comm'rs of City of Indianapolis* v. *Jacobs*, 420 U.S. 128, 129 (1975).

JOINT APPENDIX

RECORD
AND
BRIEFS

No. 11-1059

IN THE

Supreme Court of the United States

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORP.,
Petitioners,

v.

LAURA SYMCZYK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
(PHILADELPHIA)

Civil Docket For Case # :
2:09–cv–05782–MMB
Date Filed: 12/04/2009

SYMCZYK,

v.

GENESIS HEALTHCARE CORPORATION, *et al.*,

RELEVANT DOCKET ENTRIES

DATE	#	DOCKET TEXT
12/04/2009	1	COMPLAINT against GENESIS HEALTHCARE CORPORATION, ELDERCARE RESOURCES CORPORATION (Filing fee $350 receipt number PPE013779.), filed by LAURA SYMCZYK. (Attachments: # 1 Case Management Track Form, # 2 Civil Cover Sheet, # 3 Designation Form, # 4 Verification) (jeb,) (Entered: 12/07/2009)
12/04/2009		Summons Issued as to GENESIS HEALTHCARE CORPORATION, ELDERCARE RESOURCES CORPORATION. 2 Forwarded To: Counsel on 12/7/09 (jeb,) (Entered: 12/07/2009)

DATE	#	DOCKET TEXT
12/04/2009		DEMAND for Trial by Jury by LAURA SYMCZYK. (jeb,) (Entered: 12/07/2009)
		* * *
02/18/2010	8	DEFENDANTS' ANSWER to 1 Complaint, by GENESIS HEALTHCARE CORPORATION, ELDERCARE RESOURCES CORPORATION with Affirmative Defenses, Certificate of Service. (BOUDREAU, JAMES) Modified on 2/19/2010 (nd,). (Entered: 02/18/2010)
02/22/2010	9	NOTICE of Hearing: PRETRIAL TELEPHONE CONFERENCE SET FOR 3/8/2010 04:15 PM IN JUDGE'S CHAMBERS BEFORE HONORABLE MICHAEL M. BAYLSON; PLAINTIFF'S COUNSEL TO INITIATE. (Attachments: # 1 Supplement, # 2 Supplement) (ltm,) (Entered: 02/22/2010)
03/10/2010	10	ORDER THAT THE PARTIES WILL HAVE AN INITIAL 90 DAY DISCOVERY PERIOD, AT THE CLOSE IF WHICH PLAINTIFF WILL MOVE FOR CONDITIONAL CERTIFICATION UNDER 216(b) OF THE FLSA. FOLLOWING THE COURT'S RULING ON THE CERTIFICATION MOTION, THE COURT WILL ALLOW AN ADDI-

DATE	#	DOCKET TEXT
		TIONAL 6 MONTH DISCOVERY PERIOD, TO COMMENCE AT RHE CLOSE OF ANY COURT-ORDERD PERIOD, TO COMMENCE AT RHE CLOSE OF ANY COURT–ORDERD OPT–IN WINDOW. IF THERE IS A CONDITIONAL CERTIFICATION, AND THE DEFENDANT INTENDS TO FILE FOR DE-CERTIFICATION, THE COURT WILL SET AN APPROPRIATE SCHEDULE. IF EITHER PARTY INTENDS TO FILE DISPOSITIVE MOTIONS, THE COURT WILL SET A SCHEDULE AS WELL. NO TRAIL POOL DATE WILL BE SET AT THIS TIME. MAGISTRATE JUDGE DAVID STRAWBRIDGE WILL CONTACT THE PARTIES FOR A SETTLEMENT CONFERENCE UNLESS THEY ADVISE THE COURT THAT THEY INTEND TO PROCEED WITH A PRIVATE MEDIATOR.. SIGNED BY HONORABLE MICHAEL M. BAYLSON ON 3/10/10. 3/11/10 ENTERED AND COPIES E–MAILED AND FAXED. (dp,) ON 3/10/10. (Entered: 03/11/2010)
03/16/2010	11	NOTICE of Hearing: TELEPHONE CONFERENCE RE: CASE STATUS AND TO DISCUSS POSSIBLE

DATE	#	DOCKET TEXT
		SETTLEMENT CONFERENCE DATE IS SCHEDULED FOR 4/22/2010 09:15 AM BEFORE MAGISTRATE JUDGE DAVID R. STRAWBRIDGE. COUNSEL FOR PLAINTIFF IS DIRECTED TO INITIATE CALL AND TO DIAL CHAMBERS AT 267-299-7790 ONCE ALL COUNSEL ARE ON THE LINE. (lds,) (Entered: 03/16/2010)
03/23/2010	12	MOTION to Dismiss for Lack of Jurisdiction – *Subject – Matter Jurisdiction* by ELDERCARE RESOURCES CORPORATION, GENESIS HEALTHCARE CORPORATION. Memorandum and Certificate of Service. (Attachments: # 1 Memorandum in Support, # 2 Exhibit A, # 3 Text of Proposed Order) (BOUDREAU, JAMES) (Entered: 03/23/2010)
		* * *
04/05/2010	14	NOTICE of Hearing: TELEPHONE CONFERENCE SET FOR 4/7/2010 03:30 PM IN JUDGE'S CHAMBERS BEFORE HONORABLE MICHAEL M. BAYLSON REGARDING STATUS AND SCHEDULING ISSUES; PLAINTIFF'S COUNSEL TO INITIATE. (ltm,) (Entered: 04/05/2010)

DATE	#	DOCKET TEXT
		* * *
04/15/2010	18	STIPULATION AND ORDER THAT ON OR BEFORE 4/22/10, PLAINTIFF LAURA SYMCZYK WILL VOLUNTARILY DISMISS HER COMPLAINT TITLED LAURA SYMCZYK C. GENESIS HEALTHCARE CORPORATION, ET AL., CIVIL ACTION 10-1378. THIS DISMISSAL WILL BE WITHOUT ET AL., CIVIL ACTION 10-1378. THIS DISMISSAL WILL BE WITHOUT PREJUDICE, SEE ATTACHED.. SIGNED BY HONORABLE MICHAEL M. BAYLSON ON 4/15/10. 4/16/10 ENTERED AND COPIES MAILED BY CHAMBERS, E–MAILED AND FAXED BY CHAMBERS. (dp,) (Entered: 04/16/2010)
04/16/2010	19	BRIEF in Opposition re 12 MOTION to Dismiss for Lack of Jurisdiction – *Subject – Matter Jurisdiction* filed by LAURA SYMCZYK, Certificate of Service. (LYNCH, GARY) Modified on 4/19/2010 (nd). (Entered: 04/16/2010)
04/19/2010		***Set/Reset Deadlines: AMENDED PLEADINGS DUE BY 4/22/2010. (afm,) (Entered: 04/19/2010)
		* * *

DATE	#	DOCKET TEXT
04/23/2010	22	FIRST AMENDED CLASS/ COLLECTIVE ACTION COMPLAINT against ELDERCARE RESOURCES CORPORATION, GENESIS HEALTHCARE CORPORATION, filed by LAURA SYMCZYK. (dp,) (Entered: 04/26/2010)
		* * *
04/30/2010	24	REPLY to Response to Motion re 12 MOTION to Dismiss for Lack of Jurisdiction – *Subject – Matter Jurisdiction with Certificate of Service* filed by ELDERCARE RESOURCES CORPORATION, GENESIS HEALTHCARE CORPORATION. (BOUDREAU, JAMES) (Entered: 04/30/2010)
		* * *
05/14/2010	27	ANSWER to 22 Amended Complaint with Certificate of Service by ELDERCARE RESOURCES CORPORATION, GENESIS HEALTHCARE CORPORATION. (BOUDREAU, JAMES) (Entered: 05/14/2010)
05/19/2010	28	MEMORANDUM RE: MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION. SIGNED BY HONORABLE MICHAEL M. BAYLSON ON 5/19/10. 5/19/10 EN-

DATE	#	DOCKET TEXT
		TERED AND COPIES E-MAILED. (dp,) (Entered: 05/19/2010)
05/19/2010	29	ORDER THAT PLAINTIFF LAURA SYMCZYK SHALL FILE A BREIF IN SUPPORT OF CONTINUED FEDERAL JURISDICTION AND A MOTION TO CERTIFY A CLASS UNDER FEDERAL RULE OF CIVIL PROCEDURE 23, BY 6/10/10. DEFENDANT SHALL HAVE SEVEN (7) DAYS TO RESPOND. AND THE COURT WILL HOLD THE MOTION TO DISMISS UNDER ADVISEMENT.. SIGNED BY HONORABLE MICHAEL M. BAYLSON ON 5/19/10. 5/19/10 ENTERED AND COPIES E–MAILED. (dp,) (Entered: 05/19/2010)
05/19/2010		***Set/Reset Deadlines: MOTIONS DUE BY 6/10/2010. (dp,) (Entered: 05/20/2010)
05/27/2010	30	NOTICE by LAURA SYMCZYK (Attachments: # 1 Consent to Become Party Plaintiff) (LYNCH, GARY) (Entered: 05/27/2010)
		* * *
06/03/2010	32	Statement *Regarding Jurisdiction* by LAURA SYMCZYK. (LYNCH, GARY) (Entered: 06/03/2010)
06/09/2010	33	MOTION to Vacate *June 10, 2010 Class Certification Motion Deadline*

DATE	#	DOCKET TEXT
		Due to Lack of Subject Matter Jurisdiction filed by LAURA SYMCZYK.. (Attachments: # 1 Text of Proposed Order)(LYNCH, GARY) (Entered: 06/09/2010)
06/11/2010	34	ORDER THAT THE MOTION TO VACATE IS GRANTED. THE COMPLAINT IS DISMISSED WITHOUT PREJUDICE FOR LACK OF FEDERAL JURISDICTION. THE CASE IS REMANDED TO STATE COURT. THE CLERK SHALL CLOSE THIS CASE.. SIGNED BY HONORABLE MICHAEL M. BAYLSON ON 6/11/10. 6/14/10 ENTERED AND COPIES E–MAILED AND FAXED BY CHAMBERS. (dp,) (VACATED PER ORDER # 37) Modified on 6/25/2010 (dp,). (Entered: 06/14/2010)
06/11/2010		Remark: COPY OF CERTIFIED ORDER MAILED TO STATE COURT (dp,) (Entered: 06/14/2010)
		* * *
06/24/2010	37	ORDER THAT THE COURT'S ORDER DATED 6/11/10 IS VACATED. PLAINTIFF'S FLSA CLAIM IS DISMISSED WITH PREJUDICE FOR THE REASONS STATED IN THE COURT'S 5/19/10 MEMORANDUM. THE CLERK SHALL MARK THIS CASE

DATE	#	DOCKET TEXT
		CLOSED.. SIGNED BY HONORABLE MICHAEL M. BAYLSON ON 6/24/10. 6/25/10 ENTERED AND COPIES E–MAILED. (dp,) (Entered: 06/25/2010)
07/19/2010	38	NOTICE OF APPEAL as to 34 Order on Motion to Vacate, 29 Order (Memorandum and/or Opinion), Order (Memorandum and/or Opinion), 28 Memorandum and/or Opinion, 37 Order Dismissing Case, by LAURA SYMCZYK. Copies to Judge, Clerk USCA, Appeals Clerk. (LYNCH, GARY) Modified on 7/19/2010 (nd). (Entered: 07/19/2010)
07/19/2010	39	Clerk's Notice to USCA re 38 Notice of Appeal,: (dp,) (Entered: 07/20/2010)
07/20/2010		USCA Appeal Fees received $455 receipt number PPE026571 re 38 Notice of Appeal, filed by LAURA SYMCZYK. (td,) (Entered: 07/21/2010)
07/26/2010		NOTICE of Docketing Record on Appeal from USCA re 38 Notice of Appeal, filed by LAURA SYMCZYK. USCA Case Number 10-3178 (jpd,) (Entered: filed by LAURA SYMCZYK. USCA Case Number 10-3178 (jpd,) (Entered: 07/26/2010)
11/22/2011	40	ORDER of USCA THAT THE ORDERS OF THE DISTRICT COURT

DATE	#	DOCKET TEXT
		ENTERED 5/19/2010, 6/14/2010, AND 6/25/2010, BE, AND THE SAME ARE HEREBY REVERSED AND THE CASE REMANDED FOR PROCEEDING CONSISTENT WITH THIS OPINION. COSTS TAXED AGAINST APPELLEES. ALL OF THE ABOVE IN ACCORDANCE WITH THE OPIONION OF THIS COURT (kk,) (Entered: 11/23/2011)
		* * *
12/23/2011	51	ORDER THAT THE PARTIES WILL HAVE AN INITIAL 90 DAY DISCOVERY PERIOD FROM THE DATE OF THIS ORDER, ETC.. SIGNED BY HONORABLE MICHAEL M. BAYLSON ON 12/23/2011. 12/23/2011 ENTERED AND COPIES E–MAILED AND MAILED BY CHAMBERS.. (tomg, (Entered: 12/23/2011)
		* * *
04/12/2012	60	MOTION to Certify Class – *Conditional – and Judicial Notice Pursuant to Section – 216(b) of the FLSA* filed by LAURA SYMCZYK.. RESPONSES DUE BY 5/14/2012. (Attachments: # 1 Exhibit A – Proposed Notice, # 2 Text of Proposed 5/14/2012. (Attachments: # 1 Exhibit A –

DATE	#	DOCKET TEXT
		Proposed Notice, # 2 Text of Proposed Order Proposed Order) (LYNCH, GARY) (Entered: 04/12/2012)
04/12/2012	61	Memorandum In Support re 60 MOTION to Certify Class – *Conditional – and Judicial Notice Pursuant to Section 216(b) of the FLSA* filed by LAURA SYMCZYK. (LYNCH, GARY) (Entered: 04/12/2012)
		* * *
05/25/2012	64	RESPONSE in Opposition re 60 MOTION to Certify Class – *Conditional – and Judicial Notice Pursuant to Section 216(b) of the FLSA* filed by ELDERCARE RESOURCES CORPORATION, GENESIS HEALTHCARE CORPORATION. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N, # 15 Exhibit O, # 16 Exhibit P, # 17 Exhibit Q, # 18 Exhibit R, # 19 Exhibit S, # 20 Exhibit T, # 21 Exhibit U, # 22 Exhibit V) (BOUDREAU, JAMES) (Entered: 05/25/2012)
06/06/2012	65	REPLY to Response to Motion re 60 MOTION to Certify Class – *Condi-*

DATE	#	DOCKET TEXT
		tional – and Judicial Notice Pursuant to Section 216(b) of the FLSA filed by LAURA SYMCZYK. (LYNCH, GARY) (Entered: 06/06/2012)
06/18/2012	66	First MOTION for Leave to File *Sur–Reply In Opposition To Plaintiff's Motion For Conditional Certification and Judicial Notice Pursuant to Section 216(B) of the FLSA* filed by ELDERCARE RESOURCES CORPORATION, GENESIS HEALTHCARE CORPORATION. Brief and Certificate of Service. (Attachments: # 1 Exhibit "A") (BOUDREAU, JAMES) (Entered: 06/18/2012)
		* * *
06/29/2012	70	ORDER THAT THE COURT GRANTS DEFENDANTS' MOTION FOR STAY (DOC. NO. 67). ALL PROCEEDINGS ARE STAYED UNTIL FURTHER ORDER OF THE COURT, THIS CASE SHALL BE TRANSFERRED TO THE CIVIL SUSPENSE FILE; AND THE CLERK OF COURT SHALL MARK THIS CASE CLOSED FOR STATISTICAL PURPOSES, ETC. SIGNED BY HONORABLE MICHAEL M. BAYLSON ON 6/28/2012. 6/29/2012 ENTERED AND COPIES E–MAILED. (kk,) (Entered: 06/29/2012)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Civil Docket For Case # :
2:09–cv–05782–MMB
Date Filed: 06/11/2010

LAURA SYMCZYK, AN INDIVIDUAL, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED,
Appellant,

v.

GENESIS HEALTHCARE; ELDERCARE RES CORP, DBA GENESIS ELDERCARE, *et al.*,
Appellee.

RELEVANT DOCKET ENTRIES

DATE	#	DOCKET TEXT
07/23/2010		CIVIL CASE DOCKETED. Notice filed by Appellant Laura Symczyk in District Court No. 2-09-cv-05782. (CLC) https://ecf.ca3.uscourts.gov/docs1/003010227254
07/23/2010		RECORD available on District Court CM/ECF. (CLC)
		* * *
08/04/2010		ECF FILER: Concise Summary of the Case filed by Appellant Laura Symczyk, received. (GFL) https://ecf.ca3.uscourts.gov/docs1/00301023 9901

DATE	#	DOCKET TEXT
		* * *
10/04/2010		ECF FILER: ELECTRONIC BRIEF with Volume I of Appendix attached on behalf of Appellant Laura Symczyk, filed. Certificate of Service dated 10/04/2010 by ECF, 3rd party. (GFL)
10/04/2010		ECF FILER: ELECTRONIC JOINT APPENDIX on behalf of Appellant Laura Symczyk and Appellees Eldercare Res Corp and Genesis Healthcare, filed. Certificate of service dated 10/04/2010 by ECF, 3rd party. (GFL)
		* * *
11/22/2010		ECF FILER: ELECTRONIC BRIEF on behalf of Appellees Eldercare Res Corp and Genesis Healthcare, filed. Certificate of Service dated 11/22/2010 by 3rd party. [STRICKEN–See Clerk's Order dated 12/17/10].–[Edited 12/17/2010 by MCW] (JNB)
11/22/2010		ECF FILER: SUPPLEMENTAL ELECTRONIC APPENDIX on behalf of Appellees Eldercare Res Corp and Genesis Healthcare, filed. Certificate of service dated 11/22/2010 by 3rd party. [STRICKEN–See Clerk's Order dated 12/17/10].–[Edited 12/17/2010 by MCW] (JNB)
		* * *

DATE	#	DOCKET TEXT
12/02/2010		ECF FILER: Motion filed by Appellees Eldercare Res Corp and Genesis Healthcare to amend Brief for Appellees. Certificate of Service dated 12/02/2010. (JNB)
12/02/2010		ECF FILER: AMENDED ELECTRONIC BRIEF on behalf of Appellees Eldercare Res Corp and Genesis Healthcare, filed. Certificate of Service dated 12/02/2010 by 3rd party. (JNB)
12/02/2010		ECF FILER: ELECTRONIC ADDENDUM to BRIEF on behalf of Appellees Eldercare Res Corp and Genesis Healthcare, filed. Certificate of Service dated 12/02/2010 by 3rd party. (JNB)
		* * *
12/17/2010		ORDER (Clerk) The foregoing motion by Appellees for leave to file amended brief is also construed as a motion for leave to file an addendum to the brief. So construed, the motion is granted with filing as of December 2, 2010. The electronic and hard copies of Appellees brief and supplemental appendix filed on November 22, 2010 will be stricken from the docket. Counsel for Appellee must retrieve the hard copies of the previously filed brief and supplemental appendix within 14

DATE	#	DOCKET TEXT
		days of the date of this order or such will be discarded. It should be noted that in the event Appellees are awarded costs at the conclusion of the appeal, Appellees will not be entitled to recover the costs associated with the addendum. Appellant's reply brief, if any, must be filed and served within 14 days of the date of this order, filed. (MCW)
01/03/2011		ECF FILER: ELECTRONIC REPLY BRIEF by Appellant Laura Symczyk, filed. Certificate of Service dated 01/03/2011. (Electronic event and docket text edited by the office of the Clerk to reflect proper electronic event.)-[Edited 01/05/2011 by LAL] (GFL)
		* * *
01/10/2011		Calendared for Friday, 03/11/2011. (Rescheduled for Monday, March 07, 2011) (PM)
		* * *
03/07/2011		Argued on Monday, 03/07/2011 before SCIRICA, AMBRO and VANASKIE, Circuit Judges. James N. Boudreau arguing for Appellees Genesis Healthcare and Eldercare Res Corp; Gary F. Lynch arguing for Appellant Laura Symczyk. (PM)

DATE	#	DOCKET TEXT
03/18/2011		ECF FILER: Transcript of oral argument on 03/07/2011 prepared at the direction of the Court. (JNB)
08/31/2011		PRECEDENTIAL OPINION Coram: SCIRICA, AMBRO and VANASKIE, Circuit Judges. Total Pages: 28. Judge: SCIRICA Authoring. (CLC)
08/31/2011		JUDGMENT, Reversed and the case Remanded for proceedings consistent with this opinion. Costs taxed against Appellees. (CLC)
09/12/2011		ECF FILER: Motion filed by Appellees Eldercare Res Corp and Genesis Healthcare Corp for Extension of Time to file Petition for Rehearing until/for 9/28/11. Certificate of Service dated 09/12/2011. (MHM)
09/14/2011		ECF FILER: BILL OF COSTS filed on behalf of Appellant Laura Symczyk. Certificate of Service dated 09/14/2011. (GFL)
09/19/2011		ECF FILER: LETTER from Attorney James N. Boudreau, Esq. for Appellees Eldercare Res Corp and Genesis Healthcare Corp Letter to clarify typographical error in Defendant/Appellees Genesis Healthcare Corporation and ElderCare Resource Corporation's Motion requesting an extension of time in which to file a Petition to Re-hear or

DATE	#	DOCKET TEXT
		for a Rehearing En Banc. Certificate of Service dated 09/19/2011. (JNB)
09/22/2011		ORDER (Clerk) granting Motion for extension of time filed by Appellees Eldercare Res Corp and Genesis Healthcare Corp., filed. (CLC)
09/28/2011		ECF FILER: ELECTRONIC ADDENDUM to PETITION on behalf of Appellee Genesis Healthcare Corp containing Attachments to Petition for Re-Hearing En Banc, filed. Certificate of Service dated 09/28/2011 by ECF. (JNB)
09/28/2011		ECF FILER: Petition filed by Appellees Eldercare Res Corp and Genesis Healthcare Corp for Rehearing before original panel and the court en banc. Certificate of Service dated 09/28/2011. (JNB)
10/11/2011		REVIEWED AND ADJUSTED BILL OF COSTS. After adjustment, costs will be taxed in the amount of $745.61. (CLC)
10/20/2011		ORDER (MCKEE, Chief Judge, SLOVITER, SCIRICA, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY JR. and VANASKIE, Circuit Judges) denying Petition for Rehearing by Appellees Eldercare Res Corp and

DATE	#	DOCKET TEXT
		Genesis Healthcare Corp, filed. Scirica, Authoring Judge. (LML)
10/27/2011		ECF FILER: Motion filed by Appellees Eldercare Res Corp and Genesis Healthcare Corp to stay mandate. Certificate of Service dated 10/27/2011. (JNB)
11/04/2011		ORDER (SCIRICA, AMBRO and VANASKIE, Circuit Judges) directing Appellant to provide an Answer to be filed on or before 11/14/2011. Scirica, Authoring Judge. (CLC)
11/14/2011		ECF FILER: Response filed by Appellant Laura Symczyk to Motion to stay mandate. Certificate of Service dated 11/14/2011. (GFL)
11/21/2011		ORDER (SCIRICA, AMBRO and VANASKIE, Circuit Judges) denying Motion to stay mandate filed by Appellees Eldercare Res Corp and Genesis Healthcare Corp, filed. Scirica, Authoring Judge. (CLC)
11/21/2011		MANDATE ISSUED, filed. (CLC)
12/16/2011		U.S. Supreme Court Letter dated 12/13/2011 granting Appellee Genesis Healthcare Corp an extension of time to and including 02/17/2012 to file petition for writ of certiorari. Supreme Court Application No. 11A570. (CRG)

DATE	#	DOCKET TEXT
06/25/2012		NOTICE from U.S. Supreme Court. Petition for Writ of Certiorari filed by Genesis Healthcare Corp on 02/17/2012. Supreme Court Case No. 11-1059. (CRG)
06/25/2012		NOTICE of U.S. Supreme Court disposition at No. 11-1059. Petition for Writ of Ceriorari filed by Genesis Healthcare Corp granted on 06/25/2012. The motion of Chamber of Commerce of the United States of America, et al. for leave to file a brief as amici curiae is granted. The motion of DRI–The Voice of the Defense Bar for leave to file a brief as amicus curiae is granted. (CRG)

IN THE UNITED STATED DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No.:

LAURA SYMCZYK, AN INDIVIDUAL, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORPORATION, D/B/A GENESIS ELDERCARE,
Defendants.

JURY TRIAL DEMANDED

COLLECTIVE ACTION COMPLAINT

Plaintiff; Laura Symczyk, on behalf of herself and others similarly situated alleges as follows:

1. This is a collective action under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"), brought on behalf of all persons who, at any time during the past three years and up until the date of entry of judgment are or were employed by Defendants (as hereinafter defined) and whose pay was subject to an automatic meal break deduction even when those persons performed compensable work during such unpaid "meal break."

JURISDICTION AND VENUE

2. This Court has original jurisdiction over Plaintiff's claims pursuant to 29 U.S.C. §216(b) and 28 U.S.C. §1331.

3. Venue for this action properly lies in the Eastern District of Pennsylvania, pursuant to 28 U.S.C. §1391(b), because the claim arose in this judicial district.

PARTIES

4. Genesis Healthcare Corporation ("Genesis") is an integrated skilled nursing center and assisted living communities enterprise headquartered at 101 E. State Street, Kennett Square, Pennsylvania. Genesis is comprised of 200 skilled nursing centers and assisted living communities throughout 13 eastern states.

5. Upon information and belief, Genesis is a parent corporation of Eldercare Resources Corporation, d/b/a Genesis Eldercare ("Eldercare"):

6. Genesis and Eldercare are related organizations through, for example, common membership, governing bodies, trustees and/or officers and benefit plans.

7. Upon information and belief, at all times, the wage and hour and all related employee compensation policies of Genesis and Eldercare are and were centrally and collectively dictated, controlled, and ratified.

8. Upon information and belief, Genesis and Eldercare share common management and have common ownership.

9. As such, Genesis and Eldercare are the employer – single, joint or otherwise – of the Plaintiff and class members.

10. For purposes of this complaint, Genesis and Eldercare are hereinafter collectively referred to as "Defendants."

11. Defendants have approximately 36,000 employees.

12. Plaintiff, Laura Symczyk, is an adult individual residing in Philadelphia. Plaintiff was employed by Defendants from April, 2007 through December, 2007 and worked at Pennypack Center. She spent her time working as a Registered Nurse at the facility. While working for Defendants, Plaintiff was regularly required to perform compensable work during unpaid "meal breaks."

13. Plaintiff consents in writing to be a party to this collective action pursuant to 29 U.S.C. §216(b).

FACTUAL BACKGROUND

14. This action is filed on behalf of all non-exempt employees of Defendants whose pay is subject to an automatic meal break deduction even when they perform compensable work during their meal breaks. These persons include, but are not limited to, secretaries, housekeepers, custodians, clerks, porters, registered nurses, licensed practical nurses, nurses' aides, administrative assistants, anesthetists, clinicians, medical coders, medical underwriters, nurse case managers, nurse interns, nurse practitioners, practice supervisors, professional staff nurses, quality coordinators, resource pool nurses, respiratory therapists, senior research associates, operating room coordinators, surgical specialists, admissions officers,

student nurse technicians, trainers, and transcriptionists employed at any of Defendants' facilities during the three years preceding the filing of this action.

15. Given the demands of the health care industry and staffing shortages, Defendants know that to get the tasks done that it assigns to Plaintiff and class members, Plaintiff and class members have to work through their unpaid "meal breaks."

16. All non-exempt employees of Defendants are subjected to Defendants' "Meal Break Deduction Policy."

17. Upon information and belief, Defendants maintain the "Meal Break Deduction Policy" at all of its facilities.

18. Under the "Meal Break Deduction Policy," Defendants' computerized time and attendance system automatically deducts a 30 minute meal period per work shift.

19. Under Defendants' "Meal Break Deduction Policy," Defendants improperly and illegally shift the burden to Plaintiff and class members to ensure that non-qualifying "meal breaks" are not deducted from their pay.

20. Plaintiff and class members often perform compensable work for Defendants during their uncompensated "meal breaks."

21. Defendants do not ensure that Plaintiff and the class members are completely relieved of their work duties during their uncompensated "meal breaks."

22. Plaintiff and class members are routinely not completely relieved of their job duties during their uncompensated "meal breaks."

23. Plaintiff and class members routinely are required to stay at their duty post during their uncompensated "meal breaks."

24. Defendants do not prohibit Plaintiff and class members from working during their "meal breaks" and routinely suffers or permits Plaintiff and class members to perform such work.

25. Defendants routinely fail to ensure that unauthorized work is not being performed during employee "meal breaks."

26. In fact, although Defendants automatically deduct 30 minute meal periods, Defendants expect Plaintiff and class members to be available to work throughout their shifts and consistently require its employees to work during unpaid "meal breaks."

27. Plaintiff and class members are expected to eat without any change in demands from patients or relief by additional staff.

28. Plaintiff and class members are often required to respond to pages, as well as requests by patients, co-workers and management, during unpaid "meal breaks."

29. Defendants know and/or have reason to believe that Plaintiff and class members perform work during their unpaid "meal breaks."

30. Plaintiff and class members perform work for Defendants, on Defendants' premises, in plain sight, and often at management's request during their unpaid "meal breaks."

31. Defendants have observed Plaintiff and class members working through their unpaid "meal breaks." Defendants have directed Plaintiff and class members to work during their unpaid "meal breaks."

32. Even though Defendants know that Plaintiff and class members are working during "meal breaks," Defendants fail to compensate Plaintiff and class members for their work, electing instead to sit back and accept the benefits of Plaintiff and class members' uncompensated work.

33. Some evidence generally reflecting the number of uncompensated hours worked by each class member and the compensation rates for the relevant work periods is in the possession of Defendants.

34. While Plaintiff is unable to state at this time the exact amount owed to the class, Plaintiff believes that such information will become available during the course of discovery. When an employer fails to keep complete and accurate time records, employees may establish the hours worked solely by their testimony and the burden of overcoming such testimony shifts to the employer.

COLLECTIVE ACTION ALLEGATIONS

35. The preceding paragraphs are incorporated by reference as if the same were fully set forth herein.

36. Plaintiff brings this FLSA collective action on behalf of herself and all other persons similarly situated pursuant to 29 U.S.C. §§ 207 and 216(b), specifically, as follows:

> All persons employed within the three years preceding the filing of this action by Defendant, whose pay was subject to an automatic

30 minute meal period deduction even when they performed compensable work during the unpaid "meal break."

Upon information and belief, Plaintiff believes that the definition of the class will be further refined during the course of discovery.

37. Prior to discovery, Plaintiff is unable to state the exact number of the class members but estimates the class to exceed several thousand individuals.

38. There are questions of law and fact common to the class which predominate over any questions affecting individual members only. These factual and legal questions include *inter alia*:

a. Whether Plaintiff and class members were expected to and/or mandated to regularly work during unpaid meal breaks;

b. Whether Defendants failed to pay Plaintiff and class members for all hours that they worked because of the fact that they automatically deducted 30 minute meal periods despite the fact that Plaintiff and class members regularly performed compensable work during "meal breaks";

c. Whether Defendants failed to pay Plaintiff and class members all overtime compensation due to them by virtue of their "Meal Break Deduction Policy";

d. The correct statute of limitations for Plaintiffs and class members' claims;

e. The correct method of calculating back overtime pay;

f. Whether Plaintiff and class members are entitled to compensatory damages, and if so, the means of measuring such damages;

g. Whether Plaintiff and class members are entitled to restitution;

h. Whether Defendants are liable for pre-judgment interest; and

i. Whether Defendants are liable for attorney's fees and costs.

10. Defendants have acted and refused to act on grounds generally applicable to the class.

11. The claims of the representative Plaintiff are typical of the claims of the class in that Plaintiff was denied overtime wages as a result of Defendants' uniform policy of not compensating its non-exempt employees for all hours worked. This is the predominant issue which pertains to the claims of each and every class member.

12. The collective action mechanism is superior to other available methods for a fair and efficient adjudication of the controversy.

13. Plaintiff will fairly and adequately protect the interests of the class, as her interests are in alignment with those of the class, i.e., to prove and then eradicate Defendants' illegal employment practice of not paying overtime wages to their non-exempt employees.

14. Counsel for Plaintiff will adequately protect the interests of the class. Plaintiff has retained counsel experienced in class action litigation in general, and employment litigation in particular. Indeed, counsel has previously served as class counsel in employment litigation.

15. Plaintiff and the class she represents have suffered and will continue to suffer irreparable damage from the illegal policy, practice and custom regarding Defendants' pay practices.

16. Defendants have engaged in a continuing violation of the FLSA.

17. Plaintiff, as well as the individuals she represents, was denied overtime wages as a result of Defendants' pay practices. This violation was intended by Defendants and was willfully done.

18. Defendants' action in denying overtime wages to Plaintiff was intentional and constitutes a willful violation of the FLSA.

FLSA OVERTIME VIOLATION

19. The allegations set forth in the preceding paragraphs are incorporated herein.

20. At all relevant times, Defendants have been employers engaged in interstate commerce consistent with 29 U.S.C. §§206(a) and 207(a). At all relevant times, Defendants employed Plaintiff and each member of the collective action class consistent with the terms of the FLSA.

21. At all relevant times, Defendants have had annual gross revenues in excess of $500,000.00.

22. As a consequence of Defendants' employment practices whereby it automatically deducts thirty minutes for meal breaks from the pay of hourly, non-exempt employees, Plaintiff and class members were denied statutory overtime wages.

23. Plaintiff and class members were employees of Defendants within the meaning of the FLSA and, as such, were entitled to the benefits of the FLSA's overtime wage requirements.

24. Defendants' policy of denying Plaintiff and class members overtime wages represents and results in a violation of the FLSA's minimum wage requirements.

25. Defendants have failed to pay appropriate overtime wages under the FLSA.

WHEREFORE, Plaintiff respectfully requests:

A. All applicable statutory damages;

B. A Declaration that Defendants have violated the ELSA;

C. An Order designating this action as a collective action and directing the issuance of notice pursuant to 29 U.S.C. § 216(b);

D. An Order appointing Plaintiff and her counsel to represent those individuals opting in to the collective action;

E. An Order awarding counsel for Plaintiff reasonable attorneys' fees and costs; and

F. Any further relief which the Court deems appropriate under the circumstances.

Dated ____ November, 2009

Respectfully submitted,

By:_____
Trevan Borum

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No.

CASE MANAGEMENT TRACK DESIGNATION FORM

LAURA SYMCZYK, AN INDIVIDUAL, ON BEHALF OF HERSELF AND. OTHERS SIMILARLY SITUATED

v.

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORPORATION, D/B/A GENESIS ELDERCARE

In accordance with the Civil Justice Expense and Delay Reduction Plan of this court, counsel for plaintiff shall complete a Case Management Track Designation Form in all civil cases at the time of filing the complaint and serve a copy on all defendants. (See § 1:03 of the plan set forth on the reverse side of this form.) In the event that a defendant does not agree with the plaintiff regarding said designation, that defendant shall, with its first appearance, submit to the clerk of court and serve on the plaintiff and all other parties, a Case Management Track Designation Form specifying the track to which that defendant believes the case should be assigned.

SELECT ONE OF THE FOLLOWING CASE MANAGEMENT TRACKS:

(a) Habeas Corpus – Cases brought under 28 U.S.C. § 2241 through § 2255. ( )

(b) Social Security – Cases requesting review of a decision of the Secretary of Health and Human Services denying plaintiff Social Security Benefits ( )

c) Arbitration – Cases required to be designated for arbitration under Local Civil Rule 53.2. ( )

d) Asbestos – Cases involving claims for personal injury or property damage from exposure to asbestos. ( )

(e) Special Management – Cases that do not fall into tracks (a) through (d) that are commonly referred to as complex and that need special or intense management by the court. (See reverse side of this form for a detailed explanation of special management cases.) (x)

(f) Standard Management – Cases that do not fall into any one of the other tracks. ( )

December 4, 2009	Trevan Borum	Plaintiff
Date	Attorney-at-law	Attorney for
		T.Borum@
215-567-1248	215-567-1249	verizon.net
Telephone	FAX Number	E-Mail Address

Civil Justice Expense and Delay Reduction Plan
Section 1:03 - Assignment to a Management Track

(a) The clerk of court will assign cases to tracks (a) through (d) based on the initial pleading.

(b) In all cases not appropriate for assignment by the clerk of court to tracks (a) through (d), the plaintiff shall submit to the clerk of court and serve with the complaint on all defendants a case management track designation form specifying that the plaintiff believes the case requires Standard Management or Special Management. In the event that a defendant does not agree with the plaintiff regarding said designation, that defendant shall, with its first appearance, submit to the clerk of court and serve on the plaintiff and all other parties, a case management track designation form specifying the track to which that defendant believes the case should be assigned.

(c) The court may, on its own initiative or upon the request of any party, change the track assignment of any case at any time.

(d) Nothing in this Plan is intended to abrogate or limit a judicial officer's authority in any case pending before that judicial officer, to direct pretrial and trial proceedings that are more stringent than those of the Plan and that are designed to accomplish cost and delay reduction.

(e) Nothing in this Plan is intended to supersede Local Civil Rules 40.1 and 72.1, or the procedure for random assignment of Habeas Corpus and Social Security cases referred to magistrate judges of the court.

SPECIAL MANAGEMENT CASE ASSIGNMENTS (See $1.02 (e) Management Track Definitions of the Civil Justice Expense and Delay Reduction Plan)

Special Management cases will usually include that class of cases commonly referred to as "complex litigation" as that term has been used in the Manuals for Complex Litigation. The first manual was prepared in 1969 and the Manual for Complex Litigation Second, MCL 2d was prepared in 1985. This term is intended to include cases that present unusual problems and require extraordinary treatment. See §0.1 of the first manual. Cases may require special or intense management by the court due to one or more of the following factors: (1) large number of parties; (2) large number of claims or defenses; (3) complex factual issues; (4) large volume of evidence; (5) problems locating or preserving evidence; (6) extensive discovery; (7) exceptionally long time needed to prepare for disposition; (8) decision needed within an exceptionally short time; and (9) need to decide preliminary issues before final disposition. It may include two or more related cases. Complex litigation typically includes such cases as antitrust cases; cases involving a large number of parties or an unincorporated association of large membership; cases involving requests for injunctive relief affecting the operation of large business entities; patent cases; copyright and trademark cases; common disaster cases such as those arising from aircraft crashes or marine disasters; actions brought by individual stockholders; stockholder's derivative and stockholder's representative actions; class actions or

potential class actions; and other civil (and criminal) cases involving unusual multiplicity or complexity of factual issues. See §0.22 of the first Manual for Complex Litigation and Manual for Complex Litigation Second, Chapter 33.

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS
LAURA SYMCZYK, an individual, on behalf of herself and others similarly situated

(b) County of Residence of First Listed Philadelphia County
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)
Trevon Bansen, Esquire, 100 N. 18th Street, Two Logan Square, Philadelphia, PA 19103 215567-1248

DEFENDANTS
GENESIS HEALTHCARE CORPORATION and ELDERCARE RESOURCES CORPORATION, d/b/a GENESIS ELDERCARE

County of Residence of First Listed Defendant Chester County
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business in This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business in Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	☐ 610 Agriculture	☐ 422 Appeal 28 USC 158	☐ 400 State Reapportionment
☐ 120 Marine	☐ 310 Airplane	☐ 362 Personal Injury - Med. Malpractice	☐ 620 Other Food & Drug	☐ 423 Withdrawal 28 USC 157	☐ 410 Antitrust
☐ 130 Miller Act	☐ 315 Airplane Product Liability	☐ 365 Personal Injury - Product Liability	☐ 625 Drug Related Seizure of Property 21 USC 881	PROPERTY RIGHTS	☐ 430 Banks and Banking
☐ 140 Negotiable Instrument	☐ 320 Assault, Libel & Slander	☐ 368 Asbestos Personal Injury Product Liability	☐ 630 Liquor Laws	☐ 820 Copyrights	☐ 450 Commerce
☐ 150 Recovery of Overpayment & Enforcement of Judgment	☐ 330 Federal Employers' Liability		☐ 640 R.R. & Truck	☐ 830 Patent	☐ 460 Deportation
☐ 151 Medicare Act	☐ 340 Marine	PERSONAL PROPERTY	☐ 650 Airline Regs	☐ 840 Trademark	☐ 470 Racketeer Influenced and Corrupt Organizations
☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)	☐ 345 Marine Product Liability	☐ 370 Other Fraud	☐ 660 Occupational Safety/Health	SOCIAL SECURITY	☐ 480 Consumer Credit
☐ 153 Recovery of Overpayment of Veteran's Benefits	☐ 350 Motor Vehicle	☐ 371 Truth in Lending	☐ 690 Other	☐ 861 HIA (1395ff)	☐ 490 Cable/Sat TV
☐ 160 Stockholders' Suits	☐ 355 Motor Vehicle Product Liability	☐ 380 Other Personal Property Damage	LABOR	☐ 862 Black Lung (923)	☐ 810 Selective Service
☐ 190 Other Contract	☐ 360 Other Personal Injury	☐ 385 Property Damage Product Liability	☒ 710 Fair Labor Standards Act	☐ 863 DIWC/DIWW (405(g))	☐ 850 Securities/Commodities/ Exchange
☐ 195 Contract Product Liability			☐ 720 Labor/Mgmt. Relations	☐ 864 SSID Title XVI	☐ 875 Customer Challenge 12 USC 3410
☐ 196 Franchise			☐ 730 Labor/Mgmt.Reporting & Disclosure Act	☐ 865 RSI (405(g))	☐ 890 Other Statutory Actions
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	☐ 740 Railway Labor Act	FEDERAL TAX SUITS	☐ 891 Agricultural Acts
☐ 210 Land Condemnation	☐ 441 Voting	☐ 510 Motions to Vacate Sentence	☐ 790 Other Labor Litigation	☐ 870 Taxes (U.S. Plaintiff or Defendant)	☐ 892 Economic Stabilization Act
☐ 220 Foreclosure	☐ 442 Employment	Habeas Corpus:	☐ 791 Empl. Ret. Inc. Security Act	☐ 871 IRS - Third Party 26 USC 7609	☐ 893 Environmental Matters
☐ 230 Rent Lease & Ejectment	☐ 443 Housing/ Accommodations	☐ 530 General	IMMIGRATION		☐ 894 Energy Allocation Act
☐ 240 Torts to Land	☐ 444 Welfare	☐ 535 Death Penalty	☐ 462 Naturalization Application		☐ 895 Freedom of Information Act
☐ 245 Tort Product Liability	☐ 445 Amer. w/Disabilities - Employment	☐ 540 Mandamus & Other	☐ 463 Habeas Corpus - Alien Detainee		☐ 900Appeal of Fee Determination Under Equal Access to Justice
☐ 290 All Other Real Property	☐ 446 Amer. w/Disabilities - Other	☐ 550 Civil Rights	☐ 465 Other Immigration Actions		☐ 950 Constitutionality of State Statutes
	☐ 440 Other Civil Rights	☐ 555 Prison Condition			

V. ORIGIN (Place an "X" in One Box Only)
☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 29 U.S.C. § 201, et seq.
Brief description of cause: Class Action

VII. REQUESTED IN COMPLAINT: ☒ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND $ CHECK YES only if demanded in complaint: JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE DOCKET NUMBER

DATE SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

JS 44 Reverse (Rev. 12/07)

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I. (a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. **Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. **Origin.** Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. Do not cite jurisdictional statutes unless diversity. Example: U.S. Civil Statute: 47 USC 553
Brief Description: Unauthorized reception of cable service

VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. Do not cite jurisdictional statutes unless diversity. Example: U.S. Civil Statute: 47 USC 553
Brief Description: Unauthorized reception of cable service

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

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VIII. Related Cases. This section of the JS 44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DESIGNATION FORM to be used by counsel to Indicate the category of the ease for the purpose of assignment to appropriate calendar.

Address of Plaintiff:
954 Tyson Ave.. Philadelphia, PA 19111

Address of Defendant:
101 E. State Street, Kennett Square, PA 19348

Place of Accident, Incident or Transaction:
Genesis parent and subsidiaries
(Use Reverse Side For Additional Space)

Does this civil action involve a nongovernmental corporate party with any parent corporation and any publicly held corporation owning 10% or more of its stock?

(Attach two copies of the Disclosure Statement Form in accordance with Fed.R.Civ.P. 7.1(a)) Yes☐ No☒

Does this case involve multidistrict litigation possibilities? Yes☒ No☐

RELATED CASE, IF ANY:
Case Number: ____ Judge_____ Date Terminated: ___

Civil cases are deemed related when yes is answered to any of the following questions:

1. Is this case related to property included in an earlier numbered suit pending or within one year previously terminated action in this court? Yes☐ No☒

2. Does this case involve the same issue of fact or grow out of the same transaction as a prior suit pending or within one year previously terminated action in this court? Yes☐ No☒

3. Does this case involve the validity or infringement of a patent already in suit or any earlier numbered case pending or within one year previously terminated action in this court? Yes☐ No☒

4. Is this case a second or successive habeas corpus, social security appeal, or pro se civil rights case filed by the same individual? Yes☐ No☒

Civil: (Place ✓ in ONE CATEGORY ONLY)

A. *Federal Question Cases*:

1. ☐ Indemnity Contract, Marine Contract, and All Other Contracts
2. ☐ FELA
3. ☐ Jones Act-Personal Injury
4. ☐ Antitrust
5. ☐ Patent
6. ☐ Labor-Management Relations
7. ☐ Civil Rights
8. ☐ Habeas Corpus
9. ☐ Securities Act(s) Cases
10. ☐ Social Security Review Cases
11. ☐ All other Federal Question Cases
(Please specify)

B. *Diversity Jurisdiction Cases*:

1. ☐ Insurance Contract and Other Contracts
2. ☐ Airplane Personal Injury
3. ☐ Assault, Defamation
4. ☐ Marine Personal Injury
5. ☐ Motor Vehicle Personal Injury
6. ☐ Other Personal Injury (Please specify)
7. ☐ Products Liability
8. ☐ Products Liability – Asbestos
9. ☐ All other Diversity Cases
(Please specify)

ARBITRATION CERTIFICATION
(Check Appropriate Category)

I, _____, counsel of record do hereby certify:

☐ Pursuant to Local Civil Rule 53.2, Section 3(c)(2), that to the best of my knowledge and belief, the damages recoverable in this civil action case exceed the sum of $150,000.00 exclusive of interest and costs;

☐ Relief other than monetary damages is sought.

DATE: _____ _____ _____
Attorney-at-Law Attorney I.D.#

NOTE: A trial de novo will be a trial by jury only if there has been compliance with P.R.C.P. 38.

I certify that, to my knowledge, the within case is not related to any case now pending or within one year

previously terminated action in this court except as noted above.

DATE: _____ _____ _____

Attorney-at-Law Attorney I.D.#

VERIFICATION

I, Laura Symczyk, state that the averments of facts contained in the foregoing Complaint are true and correct to the best of my information, knowledge, and belief.

This statement and verification is made subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities, which provides that if I make knowingly false statements, I may be subject to criminal penalties.

/s/ Laura Symczyk
Laura Symczyk

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Case No. 2:09-cv-05782-MMB
Honorable Michael M. Baylson
(Filed via Electronic Case Filing System)

LAURA SYMCZYK,
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORPORATION,
Defendants.

DEFENDANTS' ANSWER AND STATEMENT OF AFFIRMATIVE AND ADDITIONAL DEFENSES TO PLAINTIFF'S COMPLAINT

Defendant Genesis HealthCare Corporation and Defendant ElderCare Resources Corporation (collectively "Defendants"), by and through their undersigned counsel, hereby file this Answer and Statement of Affirmative and Additional Defenses to Plaintiff's Complaint ("Complaint"). Defendants respond to the correspondingly numbered paragraphs of the Complaint as follows:

1. Admitted in part; denied in part. Defendants admit that Plaintiff purports to proceed as set forth in Paragraph 1. Defendants deny that Plaintiff has any actionable claims or is entitled to any unpaid compensation. To the contrary, Defendants have fully and properly compensated Plaintiff for all hours worked.

2. Denied. Because neither named Defendant is Plaintiff's employer under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*. (the "FLSA"), this Court lacks subject matter jurisdiction over Plaintiff's claim according to the express terms of Section 216(b) of the FLSA.

3. Denied as stated. Defendants admit that the allegations contained in Plaintiff's Complaint occurred in this District and that venue is therefore proper in this Court.

4. Denied as stated. Genesis HealthCare Corporation admits that, through various subsidiaries and affiliates, it offers a variety of healthcare services in more than 200 centers across 13 eastern states. Genesis HealthCare Corporation further states that it maintains its headquarters at 101 E. State Street, Kennett Square, Pennsylvania.

5. Denied.

6. Denied.

7. Denied.

8. Denied.

9. Denied.

10. Admitted in part; denied in part. Defendants admit that Plaintiff refers to Genesis HealthCare Corporation and Eldercare Resources Corporation jointly as Defendants in the Complaint but Defendants deny that they are in fact proper Defendants in this action as they did not employ Plaintiff.

11. Denied.

12. Admitted in part; denied in part. Defendants admit that Plaintiff is an adult and that from April 2007 to December 2007, she worked as a Registered

Nurse at Pennypack Center. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation concerning where Plaintiff currently resides, and therefore denies that allegation. Defendants also deny any and all remaining allegations contained in Paragraph 12 of Plaintiffs Complaint.

13. Admitted in part; denied in part. Defendants admit that Plaintiff purports to proceed as set forth in Paragraph 13. Defendants deny, however, that such allegation is sufficient to comply with the requirements of Section 216()) of the FLSA.

14. Admitted in part; denied in part. Defendants admit that Plaintiff purports to proceed as set forth in Paragraph 14. Defendants deny, however, that this case is properly asserted as a collective action, that Plaintiff has a valid cause of action in any respect, that Plaintiff's claims are similar to claims of the alleged putative plaintiffs, or that Plaintiff is otherwise entitled to any relief.

15. Denied.

16. Denied.

17. Denied.

18. Denied.

19. Denied.

20. Denied.

21. Denied.

22. Denied.

23. Denied.

24. Denied.

25. Denied.

26. Denied.

27. Denied.

28. Denied.

29. Denied.

30. Denied.

31. Denied.

32. Denied.

33. Denied.

34. Admitted in part; denied in part. Defendants admit that the first sentence of Paragraph 34 reflects Plaintiff's belief. Defendants deny, however, that Plaintiff and/or any members of the putative collective group are entitled to any amounts. The second sentence in Paragraph 34 sets forth conclusions of law to which no responsive pleading is required and Defendants therefore deny those allegations.

35. Paragraph 35 of Plaintiff's Complaint is an incorporation paragraph. As a result, Defendants incorporate their prior responses to all preceding paragraphs by reference.

36. Admitted in part; denied in part. Defendants admit that Plaintiff purports to proceed as set forth in Paragraph 36. Defendants deny, however, that this case is properly asserted as a collective action pursuant to 29 U.S.C. § 216(b) as defined by Plaintiff in this paragraph or otherwise, that Plaintiff has a valid cause of action in any respect, that Plaintiff's claims are similar to claims of the alleged putative plaintiffs, or that Plaintiff is otherwise entitled to any relief.

37. Admitted in part; denied in part. Defendants admit that Plaintiff is unable to state the exact number of putative class members because the class as defined is unascertainable. Regardless, Defendants deny that this case is properly asserted as a collective or class action as defined by Plaintiff in this paragraph or otherwise.

38. Denied.

a. Denied.

b. Denied.

c. Denied.

d. Denied.

e. Denied.

f. Denied.

g. Denied.

h. Denied.

i. Denied.

10.[1] Denied.

11. Denied.

12. Denied.

13. Denied.

14. Denied.

15. Denied.

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[1] In her Complaint, Plaintiff commences a new sequence of numbering paragraphs beginning with No. 10 on page 7. Defendants' Answer and Statement of Affirmative and Additional Defenses to Plaintiff's Complaint responds to those allegations following the same numerical sequencing.

16. Denied.

17. Denied.

18. Denied.

19. Paragraph 19 of Plaintiff's Complaint is an incorporation paragraph. As a result, Defendants incorporate their prior responses to all preceding paragraphs by reference.

20. Denied.

21. Denied.

22. Denied.

23. Denied. By way of further response, neither named Defendant was Plaintiff's "employer" as the term is defined in the FLSA.

24. Denied.

25. Denied.

WHEREFORE, Defendants request judgment against Plaintiff:

1. Dismissing Plaintiff's Complaint on the merits and with prejudice;

2. Awarding Defendants their attorneys' fees, costs, and disbursements; and

3. Awarding such other relief as the Court deems just and equitable.

AFFIRMATIVE AND ADDITIONAL DEFENSE

1. To the extent the Court finds that Defendants took any actions or omissions with respect to Plaintiff, such acts or omissions concerning or affecting Plaintiff and the putative classes Plaintiff purports to represent were undertaken in good faith to comply with the FLSA, and with reasonable grounds that the

actions did not violate the FLSA, and were justified, proper, and lawful, and were taken without any intent to violate the FLSA.

2. To the extent Plaintiff's and/or putative class members' claims implicate the National Labor Relations Act and/or the Labor Management Relations Act, the doctrine of preemption bars Plaintiff's purported claims and the claims she seeks to assert on behalf of others.

3. To the extent Plaintiff seeks to enforce putative class members' rights under collective bargaining agreements to which she is not a party, Plaintiff lacks standing to pursue the purported claims in whole or in part. This defense may also apply to the purported claims of some or all of the potential members of the putative classes that Plaintiff purports to represent.

4. Plaintiffs purported claims and the claims she seeks to assert on behalf of others are baired in whole or in part by the doctrines of laches, waiver, release, accord and satisfaction, and/or unclean hands.

5. Plaintiffs purported claims are barred in whole or in part by Plaintiff's failure to mitigate her alleged damages, insofar as Plaintiff failed to utilize internal complaint procedures available to her regarding the matters alleged in the Complaint. This defense may also apply to the purported claims of some or all of the potential members of the putative class that Plaintiff purports to represent.

6. To the extent that discovery reveals that Plaintiff falsely reported her hours and there is no evidence that Defendants required the false reporting of hours; and no evidence that Defendants knew or should have known that Plaintiff was providing false

information as to her hours, or to the extent discovery reveals that Plaintiff otherwise failed to follow Defendants' policies for reporting her hours, the doctrine of estoppel bars the claims asserted by Plaintiff. This defense may also apply to the purported claims of some or all of the potential members of the putative class that Plaintiff purports to represent.

7. Plaintiff's purported claims and the claims she seeks to assert on behalf of others are barred in whole or in part by Section 10 of the Portal-to-Portal Act, 29 U.S.C. § 259, because any acts or omissions giving rise to this action were done in good faith and in reliance on written administrative regulations, orders, rulings, interpretations and approvals of the Department of Labor.

8. Plaintiff's purported claims and the claims she seeks to assert on behalf of others are barred in whole or in part by Section 11 of the Portal-to-Portal Act, 29 U.S.C. § 260, because any acts or omissions giving rise to this action were done in good faith and with reasonable grounds for believing that the actions or omissions were not a violation of the FLSA or any other state or federal law.

9. To the extent that the period of time alluded to in the Complaint, or the period of time alleged later in this action, predates the limitations period set forth in Section 6(a) of the Portal-to-Portal Act, 29 U.S.C. § 255(a), such claims are barred.

10. Plaintiff does not, and cannot, fairly and adequately represent the interests of the purported class.

11. Certification of a class, as applied to the facts and circumstances of this case, would constitute a denial of Defendants' procedural rights and right to trial by jury, and to substantive and procedural due process, in violation of the Fourteenth Amendment of the United States Constitution.

12. Plaintiff is not entitled to equitable relief insofar as she has an adequate remedy at law.

13. Plaintiff's claims are barred to the extent Plaintiff and/or alleged similarly situated employees did not work more than forty (40) hours in any given work week and, therefore, are not entitled to overtime under § 207 of the FLSA.

14. Plaintiff and all alleged putative class members have been paid and/or received all wages and/or compensation due to them by virtue of their employment with Defendants.

Defendants reserve the right to assert any additional defenses they discover during the course of litigation.

WHEREFORE, Defendant Genesis HealthCare Corporation and Defendant ElderCare Resources Corporation request that this Court dismiss Plaintiff's Complaint with prejudice; that it enter judgment in Defendants' favor and against Plaintiff on all counts; and that this Court award Defendants their costs and attorneys' fees incurred in defending this action and such other relief as it deems appropriate.

Respectfully submitted,

/s/ *James N. Boudreau*
James N. Boudreau (PA 77891)
Michele Malloy (PA 88456)
Christina Tellado Winston (PA 204246)
LITTLER MENDELSON, P.C.
THREE PARKWAY
1601 Cherry Street, Suite 1400
Philadelphia, PA 19102-1321

Attorneys for Defendants
Genesis Healthcare Corporation and
Eldercare Resources Corporation

Date: February 18, 2010

CERTIFICATE OF SERVICE

I hereby certify that, on February 18, 2010, a true and correct copy of the foregoing **Defendants' Answer and Statement of Affirmative and Other Defenses to Plaintiff's Complaint** was filed and served *via CM/ECF* electronic filing, addressed to the following party:

Trevan P. Borum
Two Logan Square
100 N. 18th Street
12th Floor
Philadelphia, PA 19103
(215) 567.1248
Email: tborum@verizon.net
(Via ECF Filing)

/s/ *James N. Boudreau*

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Case No. 2:09-cv-05782-MMB
Honorable Michael M. Baylson

LAURA SYMCZYK,
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORPORATION, *et al.*,
Defendants.

DEFENDANTS' OFFER OF JUDGMENT

TO PLAINTIFF LAURA SYMCZYK:

PLEASE TAKE NOTICE that Defendants Genesis HealthCare Corp. and ElderCare Resources Corporation hereby offer to allow entry of judgment under Rule 68 of the Federal Rules of Civil Procedure as follows:

Judgment in favor of Plaintiff against Defendants on Plaintiff's Complaint and all causes of action alleged therein in the total sum of seven thousand, five hundred dollars ($7,500.00), exclusive of attorneys' fees and costs accrued to date. This amount represents the total amount Defendants shall be obligated to pay on account of any liability cla[illegible]d herein.

This Offer of Judgment is made for the purposes specified in Rule 68 and is not to be construed as an admission that Defendants are liable in this action or

that Plaintiff has suffered any damage. If Plaintiff fails to obtain a more favorable

judgment against Defendants, please take notice that pursuant to Rule 68(d), Defendants will ask the Court to deny Plaintiff any post-offer costs, including attorneys' fees, and for an award of Defendants' post-offer costs, including but not limited to, their attorneys' fees, a sum to cover costs of the services of experts in preparation for trial, costs incurred during trial, and such other costs and fees as the Court deems proper, in addition to any other rights and remedies available under the law.

This Offer will remain open until it expires by operation of law, unless otherwise withdrawn by Defendants. Evidence of this Offer is not admissible except in a proceeding to determine costs and/or fees.

/s/ James N. Boudreau
James N. Boudreau
Michele H. Malloy
Christina Tellado-Winston
LITTLER MENDELSON, P.C.
Three Parkway
1601 Cherry Street, Suite 1400
Philadelphia, PA 19102.1321

Attorneys for Defendants Genesis HealthCare Corp. and Eldercare Resources

Dated: February 18, 2010

CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below I caused a copy of the foregoing *Defendants' Offer of Judgment* to be served upon the following counsel of record by the methods indicated below:

VIA Hand Delivery:
Gerald Wells, Esquire
Faruqi & Faruqi LLP
2600 Philmont Avenue
Suite 324
Huntingdon Valley, PA 19006

Counsel for Plaintiff

/s/ James N. Boudreau
James N. Boudreau

Dated: February 18, 2010

EMPLID	LAST NAME	FIRST NAME	APPLY DATE	PAY CODE	HOURS	WAGE AMT
80221932	Symczyk	Laura	Monday, April 30, 2007	Orientation NP	5.00	$150.00
80221932	Symczyk	Laura	Tuesday, May 01, 2007	Orientation NP	8.28	$248.50
80221932	Symczyk	Laura	Wednesday, May 02, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Thursday, May 03, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Friday, May 04, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Monday, May 07, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, May 08, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, May 09, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Thursday, May 10, 2007	Training	8.00	$240.00
80221932	Symczyk	Laura	Monday, May 14, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, May 15, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, May 16, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Thursday, May 17, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Friday, May 18, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Monday, May 21, 2007	Orientation NP	8.33	$250.00
80221932	Symczyk	Laura	Tuesday, May 22, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, May 23, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Thursday, May 24, 2007	Orientation NP	6.67	$200.00
80221932	Symczyk	Laura	Thursday, May 24, 2007	Overtime	1.33	$60.00
80221932	Symczyk	Laura	Friday, May 25, 2007	Overtime	6.00	$360.00
80221932	Symczyk	Laura	Friday, May 25, 2007	Training	9.00	$270.00
80221932	Symczyk	Laura	Monday, May 28, 2007	Holiday	8.00	$240.00
80221932	Symczyk	Laura	Monday, May 28, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, May 29, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, May 30, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, May 31, 2007	Regular	8.28	$248.50
80221932	Symczyk	Laura	Saturday, June 02, 2007	Overtime	0.28	$12.75
80221932	Symczyk	Laura	Saturday, June 02, 2007	Regular	7.72	$231.50
80221932	Symczyk	Laura	Sunday, June 03, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, June 05, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, June 06, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, June 07, 2007	Regular	8.17	$245.00
80221932	Symczyk	Laura	Friday, June 08, 2007	Overtime	0.17	$7.50
80221932	Symczyk	Laura	Friday, June 08, 2007	Regular	7.83	$235.00
80221932	Symczyk	Laura	Monday, June 11, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, June 12, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, June 13, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, June 14, 2007	Regular	8.17	$245.00
80221932	Symczyk	Laura	Saturday, June 16, 2007	Overtime	0.17	$7.50
80221932	Symczyk	Laura	Saturday, June 16, 2007	Regular	7.83	$235.00
80221932	Symczyk	Laura	Sunday, June 17, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, June 18, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, June 20, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, June 21, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, June 22, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, June 25, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, June 26, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, June 28, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, June 29, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, June 30, 2007	Regular	8.00	$240.00

EMPLID	LAST NAME	FIRST NAME	APPLY DATE	PAY CODE	HOURS	WAGE AMT
80221932	Symczyk	Laura	Sunday, July 01, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, July 03, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, July 04, 2007	Holiday	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, July 04, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, July 05, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, July 06, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, July 09, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, July 10, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, July 11, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, July 12, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, July 14, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Sunday, July 15, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, July 17, 2007	Regular	8.28	$248.50
80221932	Symczyk	Laura	Wednesday, July 18, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, July 19, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, July 20, 2007	Overtime	0.28	$12.75
80221932	Symczyk	Laura	Friday, July 20, 2007	Regular	7.72	$231.50
80221932	Symczyk	Laura	Monday, July 23, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, July 24, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, July 25, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, July 26, 2007	Regular	9.00	$270.00
80221932	Symczyk	Laura	Saturday, July 28, 2007	Overtime	1.00	$45.00
80221932	Symczyk	Laura	Saturday, July 28, 2007	Regular	7.00	$210.00
80221932	Symczyk	Laura	Sunday, July 29, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, July 30, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, August 01, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, August 02, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, August 03, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, August 06, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, August 07, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, August 08, 2007	Hourly Sick	8.00	$240.00
80221932	Symczyk	Laura	Thursday, August 09, 2007	Hourly Sick	8.00	$240.00
80221932	Symczyk	Laura	Saturday, August 11, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Sunday, August 12, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, August 14, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, August 15, 2007	Hourly Personal	8.00	$240.00
80221932	Symczyk	Laura	Thursday, August 16, 2007	Hourly Personal	8.00	$240.00
80221932	Symczyk	Laura	Friday, August 17, 2007	Hourly Vacation	8.00	$240.00
80221932	Symczyk	Laura	Monday, August 20, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, August 21, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, August 22, 2007	Regular	8.57	$257.00
80221932	Symczyk	Laura	Thursday, August 23, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, August 25, 2007	Overtime	0.57	$25.50
80221932	Symczyk	Laura	Saturday, August 25, 2007	Regular	7.43	$223.00
80221932	Symczyk	Laura	Sunday, August 26, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, August 27, 2007	Regular	8.17	$245.00
80221932	Symczyk	Laura	Tuesday, August 28, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, August 30, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, August 31, 2007	Overtime	0.17	$7.50
80221932	Symczyk	Laura	Friday, August 31, 2007	Regular	7.83	$235.00

EMPLID	LAST NAME	FIRST NAME	APPLY DATE	PAY CODE	HOURS	WAGE AMT
80221932	Symczyk	Laura	Monday, September 03, 2007	Holiday	8.00	$240.00
80221932	Symczyk	Laura	Monday, September 03, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, September 04, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, September 05, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, September 06, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, September 08, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Sunday, September 09, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, September 11, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, September 12, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, September 13, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, September 14, 2007	Overtime	0.47	$21.00
80221932	Symczyk	Laura	Friday, September 14, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, September 17, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, September 18, 2007	Regular	8.83	$265.00
80221932	Symczyk	Laura	Wednesday, September 19, 2007	Regular	8.17	$245.00
80221932	Symczyk	Laura	Thursday, September 20, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, September 22, 2007	Overtime	1.00	$45.00
80221932	Symczyk	Laura	Saturday, September 22, 2007	Regular	7.00	$210.00
80221932	Symczyk	Laura	Sunday, September 23, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, September 24, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, September 26, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, September 27, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, September 28, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, October 01, 2007	Regular	8.32	$249.50
80221932	Symczyk	Laura	Tuesday, October 02, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, October 03, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, October 04, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, October 06, 2007	Overtime	0.32	$14.25
80221932	Symczyk	Laura	Saturday, October 06, 2007	Regular	7.68	$230.50
80221932	Symczyk	Laura	Sunday, October 07, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, October 09, 2007	Regular	8.15	$244.50
80221932	Symczyk	Laura	Wednesday, October 10, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, October 11, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, October 12, 2007	Overtime	0.15	$6.75
80221932	Symczyk	Laura	Friday, October 12, 2007	Regular	7.85	$235.50
80221932	Symczyk	Laura	Monday, October 15, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, October 16, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, October 17, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, October 19, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, October 20, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Sunday, October 21, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, October 22, 2007	Hourly Sick	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, October 24, 2007	Hourly Sick	7.12	$213.50
80221932	Symczyk	Laura	Thursday, October 25, 2007	Hourly Vacation	8.00	$240.00
80221932	Symczyk	Laura	Friday, October 26, 2007	Hourly Vacation	8.00	$240.00
80221932	Symczyk	Laura	Monday, October 29, 2007	Regular	8.75	$262.50
80221932	Symczyk	Laura	Tuesday, October 30, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, October 31, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, November 01, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, November 03, 2007	Overtime	0.75	$33.75

EMPLID	LAST NAME	FIRST NAME	APPLY DATE	PAY CODE	HOURS	WAGE AMT
80221932	Symczyk	Laura	Saturday, November 03, 2007	Regular	7.25	$217.50
80221932	Symczyk	Laura	Sunday, November 04, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, November 06, 2007	Regular	8.25	$247.50
80221932	Symczyk	Laura	Wednesday, November 07, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, November 08, 2007	Hourly Vacation	8.00	$240.00
80221932	Symczyk	Laura	Friday, November 09, 2007	Hourly Vacation	8.00	$240.00
80221932	Symczyk	Laura	Monday, November 12, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, November 13, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, November 14, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, November 15, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, November 17, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Sunday, November 18, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, November 20, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, November 21, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, November 22, 2007	Holiday	8.00	$240.00
80221932	Symczyk	Laura	Thursday, November 22, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, November 23, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, November 26, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, November 27, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, November 28, 2007	Regular	8.13	$244.00
80221932	Symczyk	Laura	Thursday, November 29, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, December 01, 2007	Overtime	7.70	$346.50
80221932	Symczyk	Laura	Saturday, December 01, 2007	Regular	7.87	$236.00
80221932	Symczyk	Laura	Tuesday, December 04, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, December 05, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, December 06, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, December 07, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, December 10, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, December 11, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, December 12, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, December 14, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, December 15, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Sunday, December 16, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, December 18, 2007	Regular	8.75	$262.50
80221932	Symczyk	Laura	Wednesday, December 19, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, December 20, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, December 24, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, December 25, 2007	Holiday	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, December 25, 2007	Regular	7.85	$235.50
80221932	Symczyk	Laura	Wednesday, December 26, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, December 27, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, December 29, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Sunday, December 30, 2007	Regular	8.00	$240.00

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 09-5782

LAURA SYMCZYK

v.

GENESIS HEALTHCARE CORPORATION

ORDER

AND NOW, this 10th day of March, 2010, following an unrecorded Rule 16 pretrial conference with counsel on March 8, 2010, it is hereby ORDERED as follows:

1. The parties will have an initial ninety (90) day discovery period, at the close of which Plaintiff will move for conditional certification under § 216(b) of the FLSA.

2. Following the Court's ruling on the certification motion, the Court will allow an additional six (6) month discovery period, to commence at the close of any Court-ordered opt-in window.

3. If there is a conditional certification, and the Defendant intends to file for decertification, the Court will set an appropriate schedule. In addition, if either party intends to tile dispositive motions, the Court will set a schedule as well.

4. No trial pool date will be set at this time.

5. Magistrate Judge David Strawbridge will contact the parties for a settlement conference unless they advise the Court that they intend to proceed with a private mediator.

BY THE COURT:

s/Michael M. Baylson

Michael M. Baylson, U.S.D.J.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Case No. 2:09-cv-05782-MMB
Honorable Michael M. Baylson
(Filed via Electronic Case Filing System)

LAURA SYMCZYK,
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORPORATION,
Defendants.

DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

Pursuant to Fed. R. Civ. P. 12(b)(1), Defendants Genesis HealthCare Corporation and ElderCare Resources Corporation (collectively "Defendants") hereby move for an order dismissing Plaintiff Laura Symczyk's ("Ms. Symczyk") Complaint in its entirety. As grounds for their Motion, Defendants state as follows:

1. On December 4, 2009, Ms. Symczyk filed this action, allegedly against her former employer(s), seeking unpaid wages, overtime wages, attorneys' fees and costs under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq*. ("FLSA"). (Compl. 38).

2. Shortly after the Complaint's filing, Defendants determined that because Ms. Symczyk worked for a subsidiary of Defendant Genesis HealthCare Corporation for such a short period of time, the overall value of her claim is very small. Accordingly, on

February 18, 2010, as provided in Fed. R. Civ. P. 68, Defendants extended an unequivocal Offer of Judgment ("the Offer") to Ms. Symczyk. That Offer provided her with complete relief for any and all of her alleged damages, fees, and costs (and then some).

3. Even though Defendants' Offer to Ms. Symczyk affords her all relief she seeks and could obtain in this matter, she never responded, effectively rejecting the Offer. *See* F.R.Civ.P.68(a) (providing Ms. Symczyk fourteen (14) days to accept the Offer). Consequently, Ms. Symczyk no longer has a personal stake or legally cognizable interest in the outcome of this action, a prerequisite to this Court's subject matter jurisdiction under Article III of the United States Constitution.

WHEREFORE, for all the foregoing reasons, and those contained in Defendants' accompanying Memorandum, this Court should grant Defendants' Motion to Dismiss and dismiss Plaintiff's claims in their entirety and with prejudice.

Respectfully submitted,

/s/ *James N. Boudreau*
James N. Boudreau (PA 77891)
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Attorneys for Defendants
Genesis Healthcare Corporation and
ElderCare Resources Corporation

Date: March 23, 2010

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Case No. 2:09-cv-05782-MMB
Honorable Michael M. Baylson
(Filed via Electronic Case Filing System)

LAURA SYMCZYK,
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORPORATION,
Defendants.

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

On December 4, 2009, Plaintiff Laura Symczyk ("Ms. Symczyk") filed this action, allegedly against her former employer(s), seeking unpaid wages, overtime wages, attorneys' fees and costs under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq*. ("FLSA"). Shortly after the Complaint's filing, Defendant Genesis HealthCare Corporation and Defendant ElderCare Resources Corporation (collectively "Defendants") determined that because Ms. Syrnczyk worked for a subsidiary of Defendant Genesis HealthCare Corporation for such a short period of time, the overall value of her claim is very small. Accordingly, on February 18, 2010, in accordance with Fed. R. Civ. P. 68, Defendants extended an unequivocal Offer of Judgment ("the Offer") to Ms. Symczyk. That Offer provided her with complete

relief for any and all of her alleged damages, fees, and costs (and then some). Ms. Symczyk never responded, effectively rejecting the Offer. Consequently, Ms. Symczyk no longer has a personal stake or legally cognizable interest in the outcome of this action, a prerequisite to this Court's subject matter jurisdiction under Article LII of the United States Constitution. As a result, this Court should dismiss her claims pursuant to Fed. R. Civ, P. 12(b)(1).

Defendants fully expect that Ms. Symczyk will argue against dismissal of her case because she has filed it not only on behalf of herself, but others allegedly similarly situated. The Complaint's collective action allegations, however, do not alter the fact that Ms. Symczyk remains the only plaintiff in this case, a case in which she now has no personal stake.[1] Indeed, the exceptions to the mootness doctrine generally applicable to Rule 23 opt-out class actions simply do not apply in purported collective actions under § 216(b). Accordingly, this Court is compelled to dismiss this Action, notwithstanding the Complaint's collective action allegations.

I. RELEVANT FACTS AND PROCEDURAL HISTORY

Ms. Sytnczyk worked as a Registered Nurse at the Pennypack Center from April 2007 to December 2007. (Compl. ¶ 12). On December 4, 2009, she filed this lawsuit alleging that Defendants violated the FLSA by failing to pay her wages and overtime for all

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[1] As this Court is well aware, under § 216(b) of the FLSA, individuals must affirmatively opt-in to the lawsuit by filing a consent form. Despite over four months since filing of the Complaint, none of Ms. Symczyk's former colleagues have availed themselves of this Court's jurisdiction.

hours worked. (Compl. ¶ 38). In her Complaint, she purports to bring a § 216(b) collective action on behalf of "all persons who, at any time during the past three years and up until the date of entry of judgment are or were employed by Defendants . . . and whose pay was subject to an automatic meal break deduction even when those persons performed compensable work during such unpaid 'meal break." (Compl. ¶ 1). Ms. Symczyk has yet to move for court-authorized notice in this case.

On February 18, 2010, Defendants served Ms. Symczyk with a Rule 68 Offer of Judgment that provided complete relief for all of her alleged damages. (*See* Def's. Rule 68 Offer of Judgment to Laura Symczyk, attached hereto as Exhibit A). Specifically, Defendants' Offer to Ms. Syrnczyk provided a gross payment of $7,500.00 for all wages, benefits, and other monetary damages allegedly owed to her, including liquidated damages under the FLSA. *See* Exhibit A. In addition, Defendants' Offer included reasonable attorneys' fees, costs and expenses incurred by Ms. Symczyk in bringing her claims, as determined by this Court. *Id.* Defendants formulated their Offer to ensure that they offered Ms. Symczyk relief in excess of what she could potentially recover if ultimately successfitl on her claims.[2] Even though

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[2] In calculating the offer amount, and solely for that purpose, Defendants made every assumption in Ms. Symczyk's favor, including, among other things, that: (1) Ms. Symczyk worked at the Pennypack Center from April 2007 through December 2007 (the "Alleged Damages Period"); (2) during the Alleged Damages Period, Ms. Syrnczyk was paid $30.00 per hour for regular time and $45.00 per hour for overtime hours; (3) Defendants assumed that Ms. Symczyk worked and was not compensated for 30 minutes each workday during the Alleged Damages Period; and (4) Defendants gave her credit for full (double) liquidated

Defendants' Offer to Ms. Symczyk afforded her all relief she could obtain in this matter, she never responded to the Offer.[3]

II. MS. SYMCZYK CANNOT ESTABLISH SUBJECT-MATTER JURISDICTION

A. There is No Pending Case or Controversy Before this Court.

Article III of the United States Constitution limits the jurisdiction of federal courts to "actual cases and controversies." U.S. Const. Art. III Sec. 2; *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968). "[NJ justiciable controversy is presented. . . when the question sought to be adjudicated has been mooted by subsequent developments." *Flast*, 392 U.S. at 95. As the United States Supreme Court recognizes, a defendant's offer to pay the full amount of the plaintiff's potential recovery is such a subsequent development that renders the plaintiff's claim moot because she loses a legally cognizable interest in the outcome of the litigation. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000); *Lake Coal Co., Inc. v. Roberts & Schaefer Co.*, 474 U.S. 120 (1985) (vacating judgment of lower court and remanding with instructions to dismiss case as moot when there was a "complete settlement of the underlying causes of action"). Thus, once a

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damages under the FLSA. Within these parameters and based on Ms. Syrnczyk's time records, Defendants calculated her maximum possible recovery in this litigation to be: 68 overtime hours at $45.00 an hour = $3060.00 and 13 regular hours at $30.00 an hour $390.00 for a total of $3,450.00. This amount doubled (liquidated damages under the FLSA) is $6,900.00. Exhibit A.

[3] Ms. Symczyk had fourteen (14) days to accept Defendants' Offer. *See* F. R. Civ. P. 68(a).

defendant makes such an offer, the district court loses subject-matter jurisdiction over the plaintiff's case. *See Brown v. Phila. Hous. Auth.*, 350 F.3d 338, 343 (3d Cir. 2003) (stating that "[w]hen claims of the named plaintiffs become moot before class certification, dismissal of the action is required.") (quoting *Lusardi v. Xerox Corp.*, 975 F.2d 964, 974 (3d Cir. 1992)).

Where, as here, a defendant offers all that a plaintiff could hope to recover through litigation, the plaintiff loses her personal stake in the litigation and the issues in the action are no longer considered live. *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991) (explaining that "joince the defendant offers to satisfy the plaintiffs entire demand, there is no dispute over which to litigate and a plaintiff who refines to acknowledge this loses outright, under *Fed. R. Civ. P. 12(b)(I)*, because he has no remaining stake.") (internal citation omitted); *see also* 13A Charles Alan Wright & Arthur R. Miller, Fed. Practice and Procedure: Jurisdiction 2d § 3533.2, at 236 (2d ed. 1984) ("Even when one party wishes to persist to judgment, an offer to accord all of the relief demanded may moot the case.").

It is well settled that the mootness doctrine applies with equal force to RSA collective action overtime cases where defendants have offered the named plaintiff the full relief sought (even if rejected) and no other parties have opted in to the action. *See, e.g.*, *Louisdor v. Am. Telecomms., Inc.*, 540 F. Supp. 2d 368, 373-74 (E.D.N.Y. 2008) (finding that a Rule 68 Offer of Judgment mooted plaintiff's FLSA claims); *Darboe v. Goodwill Industs. of Greater NY. & Northern NJ, Inc.*, 485 F. Supp. 2d 221 (E.D.N.Y. 2007) (same); *Ward v. Bank of N.Y.*, 455 F. Supp. 2d 262,

267 (S.D.N.Y. 2006) (granting motion to dismiss FLSA claims as moot because defendant's Rule 68 offer provided more than plaintiff could recover at trial); *Vogel v. Am. Kiosk Mgmt.*, 371 F. Supp. 2d 122, 128 (D. Conn. 2005) (holding offer of judgment exceeding plaintiff's potential recovery mooted individual claims under the FLSA even though he did not accept the offer); *Mackenzie v. Kindred Hospitals East, L.L.C.*, 276 F. Supp. 2d 12[1, 1219 (M.D. Fla. 2003) (concluding offer of judgment in excess of amount plaintiff could recover in FLSA suit mooted case); *Holcomb v. Mortgage House, Inc.*, C.A. No. 6:06-cv-45-0r1-22DAB, 2007 U.S. Dist. LEXIS 6132 (M.D. Fla. Jan. 13, 2007) (finding FLSA claim mooted by offer of judgment in full amount of potential recovery); *Thomas v. Interland, Inc.*, C.A. No. 1:02-cv-3175-CC, 2003 U.S. Dist. LEX1S 27664 (N.D. Ga. Aug. 25, 2003) (dismissing wage and overtime claims as moot). In those circumstances where an Offer of Judgment is made to the only participating plaintiff(s), subject matter jurisdiction ceases to exist and the case is properly dismissed because 'there is no justification for taking the time of the court and the defendant in the pursuit of [a] minuscule individual claim( ] which defendant has. . . satisfied.'" *Ambalu v. Rosenblatt*, 194 F.R.D. 451,453 (E.D.N.Y. 2000) (citation omitted) (alteration in original); *see also Briggs v. Arthur T Mott Real Estate, LLC*, CA. No. 06-0648, 2006 U.S. Dist. LEXIS 82891, at * 2 (E.D.N.Y. Nov. 14, 2006) (recognizing that when case lacks legally cognizable interest, court must dismiss it for lack of subject matter jurisdiction).

Here, Defendants' Offer to Ms. Symczyk provides her with compensation that is equal to or greater than the potential relief she could obtain at trial Specifically, Defendants calculated the Offer over-

whelmingly in Ms. Symczyk's favor, including amounts that she may not even be eligible to recover in this matter.[4] As a result, Ms. Symczyk lacks a legally cognizable personal stake in the outcome of this case and there is no case or controversy before this Court. The Court, therefore, should dismiss this Action with prejudice under Fed. R. Civ. P. 12(b)(1).

B. Ms. Symczyk Cannot Revive a Moot Claim by Claiming to Represent a Purported "Opt-in" Class under the FLSA.

Ms. Syrnczyk's complaint remains subject to dismissal even though Ms. Symczyk and her counsel allege that this case is an opt-in collective action under § 216(b). This is because Ms. Symczyk cannot create a "case or controversy" simply by alleging that she represents a group of potential plaintiffs. To the contrary, courts confronted with solitary individuals, claiming to represent a collection of plaintiffs under the FLSA, routinely dismiss the actions when those individuals are presented with an offer of judgment that meets or exceeds their possible demands. *See, e.g., Louisdo*, 540 F. Supp. 2d 368, 373-74 (E.D.N.Y. 2008); *Vogel*, 371 F. Supp. 2d 122, 128 (D. Conn.

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[4] Under the FLSA, an individual who has not been paid the minimum wage is entitled to recoup the amount of underpayment and, if the underpayment did not result from the good faith conduct of the employer, an equal amount in liquidated damages. *See* 29 U.S.C. § 216(b). Notwithstanding that general proposition, § 260 of the FLSA provides employers with an affirmative defense to liquidated damages in the event that they acted in good faith, but are nevertheless found to have engaged in a technical violation of the FLSA. Defendants dispute that Ms. Symczyk is entitled to liquidated damages. Solely in an effort to be overly inclusive, however, Defendants included in their Offer of Judgment an amount of liquidated damages.

2005); *Mackenzie*, 276 F. Supp. 2d 1211, 1219 (M.D. Fla. 2003); *Thomas*, C.A. No. 1:02-cv-3175-CC, 2003 U.S. Dist. LEXIS 27664 (ND. Ga. Aug. 25, 2003. In other words, courts consistently reject jurisdiction over claimed FLSA collective actions where there are no class members other than the "lead plaintiff," and when the defendants satisfies that plaintiff's demand by an offer of judgment. *See Id.*

The framework of the FLSA demonstrates precisely why dismissal is appropriate in circumstances such as here, where the only participating plaintiff is offered full relief. The opt-in procedure under § 216(b) is fundamentally different from the opt-out procedure in Rule 23 class actions. The plain language of the FLSA and its legislative history make it clear that plaintiffs in § 216(b) cases have no procedural right, independent of their claims, in a collective action.[5] Specifically, Congress enacted § 216(b) with the intent to ban representative actions. Consequently, the very nature of the FLSA's § 216(b) opt-in procedure is distinctly different from the opt-out procedures in a Rule 23 class action case.[6]

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[5] As enacted the FLSA allowed employees and others, such as unions to sue in a representative capacity on behalf of unidentified employees. Under § 216(b), Congress amended the Act to expressly bar such representative actions on behalf of absent employees. It requires employees who seek to join an FLSA suit to affirmatively opt in by filing a written notice of consent of Court. 29 U.S.C. § 216(b).

[6] Employees have a congressionally created, substantive right under § 216(b) not to have their FLSA claims adjudicated unless they expressly and affirmatively consent to do so. Employers, in turn, have a substantive right to be free from representative actions, thus ensuring that they will only be liable for alleged FLSA violations if an employee affirmatively and expressly asserts such a claim. When an employee pursues a class claim

In *Cameron-Grant v. Maxim Health Care Svcs., Inc.*, the Eleventh Circuit analyzed the specific issue currently before this Court and concluded that "a § 216(b) plaintiff. . . presents only a claim on the merits. In contrast to the Rule 23 plaintiff a § 216(b) plaintiff has no claim that he is entitled to represent other plaintiffs. Accordingly, because plaintiff has no remaining personal claims, this action is moot." 347 F.3d 1240, 1249 (11th Cir. 2003). Here, Defendants have offered Plaintiff almost twice what she could recover at trial, plus her reasonable attorneys' fees. This Court should follow the great weight of authority and hold that Defendants' Offer moots Ms. Symczyk's claim, and dismiss the Complaint with prejudice.

III. CONCLUSION

Defendants' Rule 68 Offer of Judgment affording Ms. Symczyk complete relief for her claims mooted this case. As a result, this Court no longer has subject-matter jurisdiction over it.

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under a Rule 23 opt-out action it acts to affect the rights of all putative class members unless and until they choose to opt out of the action. Specifically, upon a final adjudication of the Rule 23 opt-out class, res judicata will bar absent class members who do not opt out of the class from pursuing those claims in the future. Whereas, final adjudication of a § 216(b) action affects only those employees who affirmatively opted in to the litigation. Because no other employees have opted in to this action, this remains a single plaintiff case affecting only Ms. Symczylc's rights.

Respectfully submitted,

/s/ *James N. Boudreau*
James N. Boudreau (PA 77891)
Michele Malloy (PA 88456)
Christina Tellado Winston (PA 204246)
LITTLER MENDELSON, P.C.
THREE PARKWAY
1601 Cherry Street, Suite 1400
Philadelphia, PA 19102.1321
Attorneys for Defendants

Date: March 23, 2010

CERTIFICATE OF SERVICE

I hereby certify that, on March 23, 2010, a true and correct copy of the foregoing **Defendants' Motion to Dismiss for Lack of Subject-Matter Jurisdiction and Supporting Memorandum** was filed and served *via CM/ECF* electronic filing, addressed to the following party:

Trevan P. Borum
Two Logan Square
100 N. 18th Street
12th Floor
Philadelphia, PA 19103
(215) 567.1248
Email: t.borum@verizon.net
(Via ECF Filing)

Gary F. Lynch
Carlson Lynch Ltd.
36 N. Jefferson Street
P.O. Box 7635
New Castle, PA 16107
(724) 656.1555
Email: glynch@carlsonlynch.com
(Via ECF Filing)

Gerald Wells, III
Faruqi & Faruqi LLP
2600 Philmont Avenue
Suite 324
Huntingdon Valley, PA 19006
Email: jwells@faruqilaw.com
(Via email)

/s/ *James N. Boudreau*

EXHIBIT A

[Littler Logo]

Littler Mendelson, P.C.
Three Parkway
1601 Cherry Street, Suite 1400
Philadelphia. PA 19102.1321

February 18, 2010

James N. Boudreau
267.402.3029 direct
267.402.3000 main
267.40Z 3131 fax
jboudreau@littler.com

VIA HAND-DELIVERY AND ELECTRONIC MAIL

Gerald Wells, III
Faruqi & Faruqi LLP
2600 Philmont Avenue
Suite 324
Huntingdon Valley, PA 19006

Re: Laura Symczyk v. Genesis HealthCare Corp., C.A. 09-cv-05782-MMB

Dear Jerry:

Pursuant to Federal Rule of Civil Procedure 68, I enclose an Offer of Judgment from Genesis Health-Care Corporation ("Genesis") to Plaintiff Laura Symczyk for all claims she asserts in the above referenced matter. This Offer of Judgment includes (I) the aggregate amount of $7,500 inclusive of all damages, liquidated damages, and interest; plus (ii) such reasonable attorneys' fees, costs, and expenses to which Plaintiff is entitled by law, as the Court may determine.

This amount exceeds any amount that Plaintiff could recover in this case and is based on several significant assumptions in her favor. Genesis has made these assumptions solely for purposes of this Offer of Judgment and they would not be available to Plaintiff if this matter continues in litigation. Defendant's methodology is as follows:

Plaintiff contends that Genesis failed to pay her for time spent working through her meal breaks due to the alleged automatic deduction of meal breaks and is thus owed overtime pay and other related relief under the Fair Labor Standards Act ("FLSA"). Genesis denies these claims.

- Plaintiff worked at the Pennypack Center from April 2007 through December 2007 (the "Alleged Damages Period").
- During the Alleged Damages Period, Plaintiff was paid $30.00 per hour for regular time and $45.00 per hour for overtime hours.
- We assumed that Plaintiff worked and was not compensated for 30 minutes each workday during the Alleged Damages Period. A copy of Plaintiffs actual time records are enclosed.
- We also gave Plaintiff credit for full (double) liquidated damages under the FLSA.

Within these parameters and based on Plaintiff's time records, we calculated Plaintiffs maximum possible recovery in this litigation to be:

68 overtime hours at $45.00 an hour = $3060.00

13 regular hours at $30.00 an hour = $390.00

Total = $3,450.00

$3,450 x 2 (liquidated damages) = total alleged damages under the FLSA $6,900.00.[1]

Genesis offers Plaintiff $7,500.00 in alleged unpaid wages, plus attorneys' fees, costs and expenses as determined by the Court

In accordance with Federal Rule of Civil Procedure 68, if Plaintiff has not accepted this Offer of Judgment in writing within ten (10) days after service, this Offer of Judgment shall be deemed withdrawn and no further action will be required by Genesis. Please note that, also In accordance with Rule 68, if Plaintiff obtains a final judgment in this matter that is less favorable than this Offer, Genesis will seek to recover all reasonable costs (potentially defined to include fees under the FLSA) incurred after it made this Offer.

On behalf of Genesis, therefore, we urge Plaintiff to accept this Offer of Judgment by this deadline.

Sincerely.

/s/ James N. Boudreau
James N. Boudreau

JNB/CW

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[1] Note that this Offer presumes application of the FLSA's three year statute of limitations for alleged willful violations (which Genesis contends does not apply). In the event the Court applied the FLSA's two year statute of limitations for non-willful violations, Plaintiff's maximum recover is virtually zero. In addition, there is no obligation under the FLSA to pay straight time wages allegedly due and owing, and certainly no obligation to liquidate them. To encourage Plaintiffs acceptance of this Offer, however, Genesis has elected to include such alleged damages in its Offer.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Case No. 2:09-cv-05782-MMB
Honorable Michael M. Baylson

LAURA SYMCZYK,
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION, *et al*,
Defendants.

DEFENDANTS' OFFER OF JUDGMENT

TO PLAINTIFF LAURA SYMCZYK:

PLEASE TAKE NOTICE that Defendants Genesis HealthCare Corp. and ElderCare Resources Corporation hereby offer to allow entry of judgment under Rule 68 of the Federal Rules of Civil Procedure as follows:

Judgment in favor of Plaintiff against Defendants on Plaintiff's Complaint and all causes of action alleged therein in the total sum of seven thousand, five hundred dollars ($7,500.00), exclusive of attorneys' fees and costs accrued to date. This amount represents the total amount Defendants shall be obligated to pay on account of any liability claimed herein.

This Offer of Judgment is made for the purposes specified in Rule 68 and is not to be construed as an admission that Defendants are liable in this action or that Plaintiff has suffered any damage. If Plaintiff

fails to obtain a more favorable judgment against Defendants, please take notice that pursuant to Rule 68(d), Defendants will ask the Court to deny Plaintiff any post-offer costs, including attorneys' fees, and for an award of Defendants' post-offer costs, including but not limited to, their attorneys' fees, a sum to cover costs of the services of experts in preparation for trial, costs incurred during trial, and such other costs and fees as the Court deems proper, in addition to any other rights and remedies available under the law.

This Offer will remain open until it expires by operation of law, unless otherwise withdrawn by Defendants. Evidence of this Offer is not admissible except in a proceeding to determine costs and/or fees.

/s/ James N. Boudreau
James N. Boudreau
Michele H. Malloy
Christina Tellado-Winston
LITTLER MENDELSON, P.C.
Three Parkway
1601 Cherry Street, Suite 1400
Philadelphia, PA 19102.1321

Attorneys for Defendants
Genesis HealthCare Corp. and
Eldercare Resources

Dated: February 18, 2010

CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below I caused a copy of the foregoing *Defendants' Offer of Judgment* to be served upon the following counsel of record by the methods indicated below:

VIA Hand Delivery:

Gerald Wells, Esquire
Faruqi & Faruqi LLP
2600 Philmont Avenue
Suite 324
Huntingdon Valley, PA 19006

Counsel for Plaintiff

/s/ James N. Boudreau
James N. Boudreau

Dated: February 18, 2010

EMPLID	LAST NAME	FIRST NAME	APPLY DATE	PAY CODE	HOURS	WAGE AMT
80221932	Symczyk	Laura	Monday, April 30, 2007	Orientation NP	5.00	$150.00
80221932	Symczyk	Laura	Tuesday, May 01, 2007	Orientation NP	8.28	$248.50
80221932	Symczyk	Laura	Wednesday, May 02, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Thursday, May 03, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Friday, May 04, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Monday, May 07, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, May 08, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, May 09, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Thursday, May 10, 2007	Training	8.00	$240.00
80221932	Symczyk	Laura	Monday, May 14, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, May 15, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, May 16, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Thursday, May 17, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Friday, May 18, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Monday, May 21, 2007	Orientation NP	8.33	$250.00
80221932	Symczyk	Laura	Tuesday, May 22, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, May 23, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Thursday, May 24, 2007	Orientation NP	6.67	$200.00
80221932	Symczyk	Laura	Thursday, May 24, 2007	Overtime	1.33	$60.00
80221932	Symczyk	Laura	Friday, May 25, 2007	Overtime	8.00	$380.00
80221932	Symczyk	Laura	Friday, May 25, 2007	Training	9.00	$270.00
80221932	Symczyk	Laura	Monday, May 28, 2007	Holiday	8.00	$240.00
80221932	Symczyk	Laura	Monday, May 28, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, May 29, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, May 30, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, May 31, 2007	Regular	8.28	$248.50
80221932	Symczyk	Laura	Saturday, June 02, 2007	Overtime	0.28	$12.75
80221932	Symczyk	Laura	Saturday, June 02, 2007	Regular	7.72	$231.50
80221932	Symczyk	Laura	Sunday, June 03, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, June 05, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, June 06, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, June 07, 2007	Regular	8.17	$245.00
80221932	Symczyk	Laura	Friday, June 08, 2007	Overtime	0.17	$7.50
80221932	Symczyk	Laura	Friday, June 08, 2007	Regular	7.83	$235.00
80221932	Symczyk	Laura	Monday, June 11, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, June 12, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, June 13, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, June 14, 2007	Regular	8.17	$245.00
80221932	Symczyk	Laura	Saturday, June 16, 2007	Overtime	0.17	$7.50
80221932	Symczyk	Laura	Saturday, June 16, 2007	Regular	7.83	$235.00
80221932	Symczyk	Laura	Sunday, June 17, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, June 18, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, June 20, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, June 21, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, June 22, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, June 25, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, June 26, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, June 28, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, June 29, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, June 30, 2007	Regular	8.00	$240.00

EMPLID	LAST NAME	FIRST NAME	APPLY DATE	PAY CODE	HOURS	WAGE AMT
80221932	Symczyk	Laura	Sunday, July 01, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, July 03, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, July 04, 2007	Holiday	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, July 04, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, July 05, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, July 06, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, July 09, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, July 10, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, July 11, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, July 12, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, July 14, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Sunday, July 15, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, July 17, 2007	Regular	8.28	$248.50
80221932	Symczyk	Laura	Wednesday, July 18, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, July 19, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, July 20, 2007	Overtime	0.28	$12.75
80221932	Symczyk	Laura	Friday, July 20, 2007	Regular	7.72	$231.50
80221932	Symczyk	Laura	Monday, July 23, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, July 24, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, July 25, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, July 26, 2007	Regular	9.00	$270.00
80221932	Symczyk	Laura	Saturday, July 28, 2007	Overtime	1.00	$45.00
80221932	Symczyk	Laura	Saturday, July 28, 2007	Regular	7.00	$210.00
80221932	Symczyk	Laura	Sunday, July 29, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, July 30, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, August 01, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, August 02, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, August 03, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, August 06, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, August 07, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, August 08, 2007	Hourly Sick	8.00	$240.00
80221932	Symczyk	Laura	Thursday, August 09, 2007	Hourly Sick	8.00	$240.00
80221932	Symczyk	Laura	Saturday, August 11, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Sunday, August 12, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, August 14, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, August 15, 2007	Hourly Personal	8.00	$240.00
80221932	Symczyk	Laura	Thursday, August 16, 2007	Hourly Personal	8.00	$240.00
80221932	Symczyk	Laura	Friday, August 17, 2007	Hourly Vacation	8.00	$240.00
80221932	Symczyk	Laura	Monday, August 20, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, August 21, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, August 22, 2007	Regular	8.57	$257.00
80221932	Symczyk	Laura	Thursday, August 23, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, August 25, 2007	Overtime	0.57	$25.50
80221932	Symczyk	Laura	Saturday, August 25, 2007	Regular	7.43	$223.00
80221932	Symczyk	Laura	Sunday, August 26, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, August 27, 2007	Regular	8.17	$245.00
80221932	Symczyk	Laura	Tuesday, August 28, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, August 30, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, August 31, 2007	Overtime	0.17	$7.50
80221932	Symczyk	Laura	Friday, August 31, 2007	Regular	7.83	$235.00

EMPLID	LAST NAME	FIRST NAME	APPLY DATE	PAY CODE	HOURS	WAGE AMT
80221932	Symczyk	Laura	Monday, September 03, 2007	Holiday	8.00	$240.00
80221932	Symczyk	Laura	Monday, September 03, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, September 04, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, September 05, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, September 06, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, September 08, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Sunday, September 09, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, September 11, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, September 12, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, September 13, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, September 14, 2007	Overtime	0.47	$21.00
80221932	Symczyk	Laura	Friday, September 14, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, September 17, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, September 18, 2007	Regular	8.83	$265.00
80221932	Symczyk	Laura	Wednesday, September 19, 2007	Regular	8.17	$245.00
80221932	Symczyk	Laura	Thursday, September 20, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, September 22, 2007	Overtime	1.00	$45.00
80221932	Symczyk	Laura	Saturday, September 22, 2007	Regular	7.00	$210.00
80221932	Symczyk	Laura	Sunday, September 23, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, September 24, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, September 26, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, September 27, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, September 28, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, October 01, 2007	Regular	8.32	$249.50
80221932	Symczyk	Laura	Tuesday, October 02, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, October 03, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, October 04, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, October 06, 2007	Overtime	0.32	$14.25
80221932	Symczyk	Laura	Saturday, October 06, 2007	Regular	7.68	$230.50
80221932	Symczyk	Laura	Sunday, October 07, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, October 09, 2007	Regular	8.15	$244.50
80221932	Symczyk	Laura	Wednesday, October 10, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, October 11, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, October 12, 2007	Overtime	0.15	$6.75
80221932	Symczyk	Laura	Friday, October 12, 2007	Regular	7.85	$235.50
80221932	Symczyk	Laura	Monday, October 15, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, October 16, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, October 17, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, October 19, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, October 20, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Sunday, October 21, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, October 22, 2007	Hourly Sick	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, October 24, 2007	Hourly Sick	7.12	$213.50
80221932	Symczyk	Laura	Thursday, October 25, 2007	Hourly Vacation	8.00	$240.00
80221932	Symczyk	Laura	Friday, October 26, 2007	Hourly Vacation	8.00	$240.00
80221932	Symczyk	Laura	Monday, October 29, 2007	Regular	8.75	$262.50
80221932	Symczyk	Laura	Tuesday, October 30, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, October 31, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, November 01, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, November 03, 2007	Overtime	0.75	$33.76

EMPLID	LAST NAME	FIRST NAME	APPLY DATE	PAY CODE	HOURS	WAGE AMT
80221932	Symczyk	Laura	Saturday, November 03, 2007	Regular	7.25	$217.50
80221932	Symczyk	Laura	Sunday, November 04, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, November 06, 2007	Regular	8.25	$247.50
80221932	Symczyk	Laura	Wednesday, November 07, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, November 08, 2007	Hourly Vacation	8.00	$240.00
80221932	Symczyk	Laura	Friday, November 09, 2007	Hourly Vacation	8.00	$240.00
80221932	Symczyk	Laura	Monday, November 12, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, November 13, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, November 14, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, November 15, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, November 17, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Sunday, November 18, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, November 20, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, November 21, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, November 22, 2007	Holiday	8.00	$240.00
80221932	Symczyk	Laura	Thursday, November 22, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, November 23, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, November 26, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, November 27, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, November 28, 2007	Regular	8.13	$244.00
80221932	Symczyk	Laura	Thursday, November 29, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, December 01, 2007	Overtime	7.70	$346.50
80221932	Symczyk	Laura	Saturday, December 01, 2007	Regular	7.87	$236.00
80221932	Symczyk	Laura	Tuesday, December 04, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, December 05, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, December 06, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, December 07, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, December 10, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, December 11, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, December 12, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, December 14, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, December 15, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Sunday, December 16, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, December 18, 2007	Regular	8.75	$262.50
80221932	Symczyk	Laura	Wednesday, December 19, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, December 20, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, December 24, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, December 25, 2007	Holiday	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, December 25, 2007	Regular	7.85	$235.50
80221932	Symczyk	Laura	Wednesday, December 26, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, December 27, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, December 29, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Sunday, December 30, 2007	Regular	8.00	$240.00

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed 03/23/10]

Case No. 2:09-cv-05782-MMB

LAURA SYMCZYK,
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION and ELDERCARE RESOURCES CORPORATION,
Defendants.

ORDER

AND NOW, this ____ day of _____2010, upon consideration of the Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, it is hereby **ORDERED** that Motion is **GRANTED** and Plaintiffs Complaint is **DISMISSED** with prejudice in its entirety.

BY THE COURT:

_____

J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed 04/15/10]

CIVIL ACTION
NO. 09-5782

LAURA SYMCZYK,

v.

GENESIS HEALTHCARE CORPORATION, et al.

CIVIL ACTION
NO. 10-1378

LAURA SYMCZYK,

v.

GENESIS HEALTHCARE CORPORATION, et al.

STIPULATED ORDER

Counsel for the parties in the above-referenced civil actions conferred on April 9, 2009, and jointly request that the Court enter a Stipulated Order as follows:

1. On or before April 22, 2010, Plaintiff Laura Symczyk will voluntarily dismiss her Complaint titled *Laura Symczyk v. Genesis HealthCare Corporation, et al.*, Civil Action No. 10-1378. This dismissal will be without prejudice.

2. On or before April 22, 2010, Plaintiff Laura Symczyk will amend her Complaint titled *Laura Symczyk v. Genesis HealthCare Corporation, et al.*, Civil Action No. 09-5782 to include, inter alit; those state law claims asserted in the Complaint docketed at 10-1378.

3. Defendants will answer, move, or otherwise plead to the Amended Complaint within 20 days of the filing of the Amended Complaint.

4. The filing of the Amended Complaint will not moot or otherwise affect the Court's consideration or determination of Defendant's pending Motion to Dismiss (D.E. #12).

Respectfully submitted,

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Attorneys for Defendants
Genesis Healthcare
Corporation and Eldercare
Resources Corporation

SO ORDERED this 15th day of April 2010

Michael M. Baylson, U.S.D.J.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed 04/16/10]

Case No.: 2:09-cv-05782-MMB

LAURA SYMCZYK, an individual, on behalf of herself and others similarly situated,
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION and ELDERCARE RESOURCES CORPORATION,
Defendants.

Honorable Michael M. Baylson

(Filed via Electronic Case Filing System)

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

This case is being brought as a collective action under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq*. ("FLSA"). Although this Court, on March 10, 2010, issued a scheduling order providing Plaintiff with ninety days to conduct discovery and file a motion for conditional certification pursuant to Section 216(b) of the FLSA, Defendants, having offered Plaintiff judgment on her individual claim pursuant to Fed. R. Civ. P. 68, now seek dismissal of this action in its entirety, claiming that there is no remaining "case or controversy." Defendants' strate-

gic attempt to "pick-off' the Plaintiff before the Court can meaningfully consider and decide the Section 216(b) motion represents a tactic which is heavily disfavored by the courts and that has been routinely rejected. Indeed, following guidance by the Supreme Court, the Third Circuit, in a virtually identical case involving Fed. R. Civ. P. 23, has adopted a "relation back" doctrine, whereby the certification decision can be said to "relate back" to the filing of the complaint, thereby enabling the plaintiff to retain standing to litigate class certification even though his or her individual claim is arguably mooted by an offer of judgment. Plaintiff respectfully suggests that there is no ground for distinction of the Third Circuit's decision adopting the "relation back" doctrine simply because this case involves collective certification under Section 216(b) of the FLSA rather than class certification under Fed. R. Civ. P. 23. Accordingly, based upon the controlling precedent of the Third Circuit, as well as the highly persuasive decisions issued by several other courts addressing the issue in the precise context of the FLSA, Plaintiff respectfully requests that Defendants' motion be denied.

I. PROCEDURAL AND FACTUAL BACKGROUND

On December 4, 2009, Plaintiff filed her Collective Action Complaint alleging Defendants violated the FLSA by implementing an automatic meal break deduction policy, pursuant to which thirty minutes is automatically deducted from each employees' work time every shift, regardless of whether such employee actually receives an uninterrupted meal break. On February 18, 2010, Defendants filed an Answer to Plaintiff's Complaint. On that same day, Defendants served a Fed.R.Civ.P.68 Offer of Judgment on Plaintiff. Plaintiff did not respond to that offer.

On March 8, 2010, this Court held a Fed.R.Civ.P. 16 Pretrial Telephone Conference with the Parties' Counsel. Following that conference, on March 10, 2010, this Court entered a scheduling order. (See Docket No. 10). Pursuant to that order, the Parties will have an initial ninety (90) day discovery period, at the close of which Plaintiff shall move for conditional certification under Section 216(b) of the FLSA. Following this Court's ruling on Plaintiff's certification motion, the Parties will have an additional six (6) month discovery period, which will begin at the close of any Court-ordered opt-in window.

Thereafter, Defendants filed the present motion to dismiss on March 23, 2010, claiming that Plaintiff's claim has been mooted by her failure to accept the offer of judgment.

II. RULE 12(b)(1) STANDARD

Federal Rule of Civil Procedure 12(b)(1) provides that a court may dismiss a complaint for "lack of subject-matter jurisdiction." Fed. R. Civ. P. 12(b)(1). A motion to dismiss under Rule 12(b)(1) therefore challenges the power of a federal court to hear a claim or case. *See Petruska v. Gannon Univ.*, 462 F.3d 294, 302 (3d Cir.2006). In the face of a 12(b)(1) motion, the plaintiff has the burden to "convince the court it has jurisdiction." *Gould Elecs., Inc. v. United States*, 220 F.3d 169, 178 (3d Cir.2000); *see also Kehr Packages v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir.1991) ("When subject matter jurisdiction is challenged under Rule 12(b)(1), the plaintiff must bear the burden of persuasion.").

III. ARGUMENT

A. The Constitutional Doctrine Of Standing And Mootness Generally

Article III of the United States Constitution limits the jurisdiction of the federal courts to "cases and controversies." U.S. Const. art. III §2. *Int'l Brotherhood of Boilermakers v. Kelly*, 815 F.2d 912, 914 (3d. Cir. 1987). However, "'a case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" *Id.* at 915 (quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969)). "That is, if developments occur during the course of adjudication that eliminate a plaintiff's personal stake in the outcome of a suit or prevent a court from being able to grant the requested relief, the case must be dismissed as moot." *Donovan ex. rel. Donovan v, Punxsutawney Area School Bd.*, 336 F.3d 211,216 (3d Cir.2003). An offer of complete relief will generally moot the plaintiffs claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation. *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir.1991)("Once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate and a plaintiff who refuses to acknowledge this loses outright, under Fed.R.Civ.P. 12(b)(1), because he has no remaining stake.") (internal citation omitted); *see also* 13A Charles Alan Wright & Arthur R. Miller, Fed. Practice and Procedure: Jurisdiction 2d § 3533.2, at 236 (2d ed. 1984) ("Even when one party wishes to persist to judgment, an offer to accord all of the relief demanded may moot the case.").

B. The Third Circuit Has Held That The "Relation Back" Doctrine Precludes A Finding Of Mootness In The Class Action Context·

Although the Third Circuit has not, in the context of an FLSA action, addressed the issue raised by Defendants' motion to dismiss, i.e., whether a defendant may use Rule 68 to "pick-off" a representative plaintiff, the Third Circuit has considered and rejected the use of such tactic in the context of other representative actions, in particular a Rule 23 class action. In *Weiss v. Regal Collection*, 385 F.3d 337 (3d Cir. 2004), the plaintiff filed a class action complaint alleging violations of the Fair Debt Collection Practices Act ("FDCPA") and seeking statutory damages on behalf of himself and a putative class. Before filing an answer and before the plaintiff moved to certify the class, the defendants proffered a Rule 68 offer of judgment in an amount equal to the statutory limit on damages, plus costs and reasonable attorneys' fees. The plaintiff did not accept the offer of judgment and defendants subsequently moved to dismiss under Fed.R.Civ.P. 12(b)(1), arguing that plaintiff's claim was rendered moot because the offer of judgment provided him with the maximum damages available under the FDCPA. Applying traditional mootness principles, the district court dismissed plaintiff's complaint.

The Third Circuit reversed the district court, holding that the "relation back" doctrine precludes a finding of mootness prior to a motion for class certification. Rather than dismiss the action as moot, the Third Circuit held that the district court should have permitted the representative plaintiff to file a class certification motion, and that such motion would "relate back" to the filing of the complaint, thereby

eliminating any concerns that the representative plaintiff lacked standing to sue. *Id.* at 348. In so holding, the Third Circuit stated as follows:

> There appears to be considerable authority that once a motion for class certification has been filed, the "relation back" doctrine explained by the Supreme Court in *Sosna v. Iowa*, 419 U.S. 393, 399,95 S.Ct. 553,42 L.Ed.2d 532 (1975) comes into play. In Sosna, the Court recognized:
>
> > There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.
>
> *Id.* at 402 n. 11, 95 S.Ct. 553. Furthermore, in *Geraghty* the Court held class certification may relate back to the filing of the complaint where claims are "so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." 445 U.S. at 399, 100 S.Ct. 1202 (1980). The mootness exception recognizes that, in certain circumstances, to give effect to the purposes of Rule 23, it is necessary to conceive of the named plaintiff as a part of an indivisible class and not merely a single adverse party even before the class certification question has been decided. By relating class certification back to the filing of a class complaint, the class representative would

retain standing to litigate class certification though his individual claim is moot. But the question in this case is whether the "relation back" doctrine should apply only after the filing of a motion for class certification or whether it may also be employed after the filing of a class complaint.

The "relation back" doctrine generally has been used for "inherently transitory" claims. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 52, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991) (quoting *Geraghty*, 445 U.S. at 399, 100 S.Ct. 1202). Although Weiss's claims here are not "inherently transitory" as a result of being time sensitive, they are "acutely susceptible to mootness," *Comer v. Cisneros*, 37 F.3d 775, 797 (2d Cir.1994), in light of defendants' tactic of "picking off" lead plaintiffs with a Rule 68 offer to avoid a class action. As noted, this tactic may deprive a representative plaintiff the opportunity to timely bring a class certification motion, and also may deny the court a reasonable opportunity to rule on the motion.

It bears noting that most of the cases applying the relation back doctrine have done so after a motion to certify the class has been filed. *See Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1048-49 (5th Cir. July 1981); *Susman v. Lincoln Am. Corp.*, 587 F.2d 866, 869-71 (7th Cir. 1978). Nonetheless, reference to the bright line event of the filing of the class certification motion may not always be well-founded. Representative actions vary according to the substantive claims and the courses of action. There are at least three distinct events on the path to a certified

> class: filing the class complaint, filing the motion for class certification, and a decision on the motion. Yet plaintiffs may file the class certification motion with the class complaint, and in some cases, include a motion for approval of an already negotiated settlement. Of course, the federal rules do not require certification motions to be filed with the class complaint, nor do they require or encourage premature certification determinations. It seems appropriate, therefore, that the class action process should be able to "play out" according to the directives of Rule 23 and should permit due deliberation by the parties and the court on the class certification issues.
>
> That said, the proper procedure is for the named representative to file a motion for class certification. That did not occur here. But neither was there undue delay. In circumstances like these, we believe the relation back doctrine should apply. Absent undue delay in filing a motion for class certification, therefore, where a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint. Because in this case, no motion for class certification was made, we will direct the trial court to allow Weiss to file the appropriate motion.

Id at 346-48 (footnotes omitted).

The holding of the Third Circuit, i.e., that the "relation back" doctrine can be used to avoid mootness and permit representative actions to "play out" with "due deliberation" by the court on the certification issue, applies equally in the context of a Section 216(b)

collective action. Accordingly, Plaintiff respectfully suggests that the Weiss decision represents controlling authority and Defendants' motion should therefore be denied.[1]

Although Defendants inexplicably failed to cite or discuss the *Weiss* decision in their memorandum supporting their motion to dismiss, Plaintiff anticipates Defendants will argue that the Third Circuit's decision in *Weiss* is distinguishable because it was decided in the Rule 23 context. While there are certainly differences between Section 216(b) and Rule 23, the most significant being that Section 216(b) contemplates an "opt-in" class and Rule 23 typically provides for an "opt-out" class, these differences were not relevant to the Third Circuit's analysis and holding regarding the use of the "relation back" doctrine in response to a Rule 68 mootness argument. Indeed, several courts, analyzing this precise question in the wake of the Third Circuit's decision in *Weiss*, have recognized that, for purposes of the "relation back" doctrine, there is no difference between Rule 23 and Section 216(b). In *Sandoz v. Cingular Wireless, LLC*, 553 F.3d 913 (5th Cir. 2008), the Fifth Circuit held that the "relation back" doctrine applies as much in an FLSA case as in a Rule 23 case because both types of actions are susceptible to strategic mooting by defendants through the use of a Rule 68 offer of judgment. After a thorough discussion of *Weiss*, the Fifth Circuit concluded:

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[1] In the event that this Court determines that the *Weiss* decision is not controlling, Plaintiff submits that it has been the only decision issued by the Third Circuit that has addressed the issue in this case, albeit in a Rule 23 context, and, therefore, the analysis is at the very least persuasive authority.

> [T]he differences between class actions and FLSA § 216(b) collective actions do not compel a different result regarding whether a certification motion can "relate back" to the filing of the complaint. The status of a case as being an "opt in" or "opt out" class action has no bearing on whether a defendant can unilaterally moot a plaintiff's case through a Rule 68 offer of judgment. Although the differences between Rule 23 class actions and FLSA § 216(b) collective actions alter the conceptual mootness inquiry, each type of action would be rendered a nullity if defendants could simply moot the claims as soon as the representative plaintiff files suit. Thus, the policies behind applying the "relation back" principle for Rule 23 class actions apply with equal force to FLSA § 216(b) collective actions. *Cf Rubery v. Buth-Na-Bodhaige, Inc.*, 494 F.Supp.2d 178, 181 (W.D.N.Y.2007) (holding that the defendant's motion to dismiss based on its Rule 68 offer of judgment was premature because the court had not yet ruled on the plaintiffs motion for certification of the action as a class action or collective action). This principle also comports with the balance the FLSA attempts to strike. *See De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 306 (3d Cir.2003) (noting that Congress enacted the opt-in provision for FLSA collective actions in an attempt to "strike a balance to maintain employees' rights but curb the number of lawsuits").

Id. at 920. *See also, Nash v. CVS Caremark Corp., et al.*, __F.Supp.2d__, 2010 WL 446178 (D.R.I. Feb. 9, 2010)(application of the "relation back" doctrine in a collective action under the FLSA precluded a finding of mootness); Yeboah v. Central Parking System, 2007 WL 3232509, *3 (E.D.N.Y. Nov. 1, 2007)(recognizing

that the concerns that arise when Rule 68 is applied in the Rule 23 class action context are also present when Rule 68 is applied in the FLSA collective action context); *Rubery v. Buth-Na-Bodhaige, Inc.*, 494 F.Supp.2d 178, 180-81 (W.D.N.Y. 2007) (same).

Contrary to Defendants' anticipated assertion, the differences between Rule 23 class actions and Section 216(b) collective actions actually weigh in favor of rejecting a finding of mootness. As recently explained by the District of Rhode Island, the procedural differences between Rule 23 class actions and Section 216(b) collective actions make the application of the "relation back" doctrine even more appropriate in a collective action:

> FLSA actions are more vulnerable to manipulation than Rule 23 actions. For the latter, filing a complaint tolls the statute of limitations for all the alleged class members, whether they know of the lawsuit or not. In contrast, parties alleged to be "similarly situated" in a § 216(b) case must affirmatively opt in to toll the limitations period.
>
> This means that defendants can bleed value out of a large pool of outstanding FLSA claims in a way they cannot with a comparable group of Rule 23 claims. "Picking off" § 216 (b) plaintiffs delays the point at which any collective action can be provisionally certified. This stalls notification to potential "similarly situated" parties. The longer it takes for an FLSA action to mature, the lower members' damages will be once they opt in, given the two-year limitations period. In a parallel situation under Rule 23, the clock for absentees stops upon the filing of a complaint that raises their claims. Thus, even if employers pick off some named plaintiffs, the limitations period for

> absentees pauses while any applicable class action is pending.
>
> . . .
>
> Simply put, it is easier to drown collective actions than class actions. If allowed to use Rule 68 as a weapon, defendants can torpedo complaint after complaint, leaving opt-ins to swim for the nearest viable action as their claims leak value. This justifies a more relaxed mootness standard in FLSA cases than Rule 23 cases...

Nash, 2010 WL 446178, at ** 4-5 (citations omitted).

Furthermore, the discussion by the Third Circuit itself in Weiss reveals that the Court did not draw any meaningful distinction between Rule 23 and Section 216(b), for purposes of considering and adopting the "relation back" doctrine. Throughout its decision in Weiss, the Third Circuit cites and discusses its prior decision in *Lusardi v. Xerox Corp.*, 975 F.2d 964 (3d Cir. 1992), a case involving an age discrimination claim brought as a class action pursuant to the procedural enforcement mechanism of Section 216(b). In *Lusardi*, the plaintiffs, upon decertification of their Section 216(b) class, voluntarily settled their individual age discrimination claims and then subsequently filed a new motion for class certification pursuant to Section 216(b). The Third Circuit, in affirming the district court's dismissal of the class claims, noted that plaintiffs, having entered into individual settlements, no longer had justiciable claims and could not therefore pursue Section 216(b) certification. *Lusardi*, 975 F.2d at 979-80.

In *Weiss*, the Third Circuit expressed concern that its adoption of the "relation back" doctrine "creates some tension with our opinion in *Lusardi*." *Weiss*, 385

F3d at 348. In reconciling its decision in *Weiss* with its prior decision in *Lusardi*, however, the Third Circuit did not simply rely upon the obvious fact that *Lusardi* dealt with Section 216(b). Rather, the Third Circuit reconciled its decision with *Lusardi* by noting that *Lusardi* involved a voluntary settlement rather than an offer of judgment. *Weiss*, 385 F.3d at 348 ("In this appeal, the 'picking off' scenarios described by the Supreme Court in Roper are directly implicated. In *Lusardi* they were not"). Plaintiff respectfully suggests that the failure of the Third Circuit to distinguish *Lusardi* on the basis that it involved Section 216(b) rather than Rule 23 is telling and directly undermines any suggestion that the procedural differences between Section 216(b) and Rule 23 are in any way relevant to the issues presented by Defendants' motion to dismiss.[2] In short, Defendants' anticipated argument that the Weiss decision is inapplicable because it was decided in the Rule 23 context is nothing more than a red herring.

C. Defendants' Argument in Favor of Dismissal Completely Ignores and/or Overlooks The "Relation Back" Doctrine

In their memorandum in support of their motion to dismiss, Defendants make the unremarkable argument that Plaintiff cannot "revive a moot claim"

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[2] Notably, in *Brown v. Philadelphia Hous. Auth*, 350 F.3d 338 (3d Cir. 2003), upon which Defendants rely for the proposition that once a defendant makes an offer of judgment, the "district court loses subject matter jurisdiction over the plaintiff's case," the Third Circuit again cited and relied upon *Lusardi* with no mention of the fact that *Lusardi* arose under Section 216(b). *See* Weiss, 385 F.3d at 348, n. 20. Indeed, Defendant actually cites the portion of the Brown decision which quotes *Lusardi*. (Defendants' brief at pp. 3-5).

because, prior to a class certification ruling, a Section 216(b) plaintiff, unlike a Rule 23 class plaintiff, has no "present interest" in representing the class. (Defendants' Brief p. 6). Plaintiff concedes this argument. However, the analysis does not stop there. The application of the "relation back" doctrine must be considered, consistent with the Third Circuit's holding in *Weiss*. As discussed, *supra*, the fact that Plaintiff is a Section 216(b) plaintiff does not compel a different result than what was reached in *Weiss*. *See Sandoz*, 553 F.3d at 920 ("[T]he policies behind applying the 'relation back' principle for Rule 23 class actions apply with equal force to FLSA §216(b) collective actions.")(citation omitted).

Furthermore, *Cameron-Grant v. Maxim Health Care Svcs., Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003), a case in which, according to the Defendants, "the Eleventh Circuit analyzed the specific issue currently before this Court" (Defendants' Brief p. 7), is fundamentally different from the instant action.[3] In *Cameron-Grant*, four employees filed a collective action alleging violations of the FLSA. The four named plaintiffs then filed a motion for permission to proceed as a collective action and for an order permitting court-supervised notice. Subsequently, three of the four named plaintiffs filed a stipulation of

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[3] In fact, in a decision issued after *Cameron-Grant*, the Southern District of Florida explicitly stated that the Eleventh Circuit has never addressed the issue currently before this Court: "The Eleventh Circuit has never addressed the issue of the effect of an offer of judgment made to a Plaintiff in a FLSA collective action. This Court, however, finds the reasoning of several other courts which have been reluctant to dismiss a FLSA collective action after an offer of judgment has been made to be persuasive." *Guerra v. Big Johnson Concrete Pumping, Inc.*, 2006 WL 2290517, ** 2-3 (S.D. Fla. Jun. 28, 2006).

dismissal with prejudice after settling their claims voluntarily with defendant. The defendant then stipulated to paying the fourth plaintiff's claims for unpaid wages and overtime pay. (The fourth plaintiff had other claims pending.) Thereafter, the district court denied the then pending motion for class notice and certification. After denial of that motion, the fourth plaintiff and defendant agreed to the dismissal of his remaining claims and the district court entered final judgment. The fourth plaintiff then attempted to appeal the district court's order denying the motion for class notice and certification. The Eleventh Circuit held that the denial of the motion for class notice and certification was not reviewable on appeal because, under the circumstances presented, the named plaintiff's claims had become moot.

Cameron-Grant is distinguishable from this case and does not compel the result sought by Defendants for the following reasons:

1) Cameron-Grant involved a **voluntary** settlement and dismissal of all claims, **not** an offer of judgment by which the defendant sought to unilaterally terminate an FLSA collective action before it had a chance to be certified;

2) The issue in *Cameron-Grant* was whether the named plaintiff, who **voluntarily** settled and dismissed his claims, had standing to appeal a denial of a motion for class notice; and,

3) The Eleventh Circuit in *Cameron-Grant* was **not** presented with, and did not decide, the issue of whether a defendant may unilaterally terminate an FLSA collective action through an individual offer of judgment before the certification issue.

Thus, not only do Defendants completely overlook the applicability of the "relation back" doctrine, which would preclude a finding of mootness in this case, but the principal authority on which they rely is wholly distinguishable.

D. Courts Routinely Have Been Reluctant To Permit Defendants To "Pick-off" Individual Plaintiffs In A Class/Collective Action

Allowing a defendant to use a Rule 68 offer of judgment to "pick-off" individual claimants before class certification can be reached effectively nullifies representative actions because a defendant can easily pay off any given member of a class for a fraction of the entire class's potential total damages. Indeed, one of the primary reasons for representative actions in the first place is because individual damages are typically small. *Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980)("Pick-offs" "obviously would frustrate the objectives of class actions" - that is, enabling plaintiffs to redress wrongs even "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages . . . ."). Accordingly, courts generally look unfavorably upon this inherently inequitable tactic of "picking-off" representative plaintiffs and routinely have disallowed this practice.

In *Roper*, the Supreme Court recognized the inherent evils in allowing a defendant to "short circuit" a class action by paying off individual class representatives. In holding that the individual class representatives retained an interest in appealing the district court's denial of class certification subsequent to offers of judgment to the named plaintiffs, the Court stated as follows:

> A district court's ruling on the certification issue is often the most significant decision rendered in these class-action proceedings. To deny the right to appeal simply because the defendant has sought to "buy off" the individual private claims of the named plaintiffs would be contrary to sound judicial administration. Requiring multiple plaintiffs to bring separate action, which effectively could be "picked off" by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover, it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement.

Id. at 339.

Although a plaintiff in a Section 216(b) collective action, in contrast to a Fed. R. Civ. P. 23 plaintiff, does not retain an interest in representing any class members other than those who affirmatively "opt-in," many courts, recognizing that the rationale set forth in *Roper* applies with equal force in Section 216(b) collective actions, have concluded that a Rule 68 "pick-off" is not appropriate in the context of the FLSA. For example, in *Yeboah*, the defendant in an FLSA case, as here, served a Rule 68 Offer of Judgment and then moved to dismiss based on its assertion that the offer more than fully satisfied plaintiff's claims. In denying the defendant's motion, the court found:

> The application of Fed. R. Civ. P. 68 in the FLSA context raises pragmatic concerns, including the danger that defendants will "provid[e] an offer of judgment to the initial plaintiff in a FLSA collective action in order to bar the case from proceeding as to all similarly situated plaintiffs,"

which, as one district court observed, would "violate[] the very policies behind the FLSA." (citation omitted). The Supreme Court has remarked on the importance of guarding against this danger in the related context of Rule 23 class actions; "Requiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions. . ." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980). *See also, Weiss v. Regal Collections*, 385 F.3d 337, 344 (3d Cir. 2004) ("[A]llowing the defendant here to 'pick off' a representative plaintiff with an offer of judgment less than two months after the complaint if filed may undercut the viability of the [Rule 23] class action procedure, and frustrate the objectives of this procedural mechanism. . . .")(citation omitted). Defendant objects to plaintiff's citation to Roper, Weiss, and other decisions in the Rule 23 context. These cases are inapposite, defendant insists, since permitting a Rule 68 offer to moot a FLSA plaintiff's claims does not risk prejudice to absent class members, as it does in the Rule 23 context, where any judgment binds all class members save those who have opted out. However, even if defendants are correct that permitting defendants to "pick off" individual FLSA plaintiffs presents no danger of prejudicing absent class members, as it would in the Rule 23 context, the *Roper* Court described at least two other dangers. First, as noted above, the Court declared that permitted such "pick-offs" "obviously would frustrate the objectives of class

> actions" — that is, enabling plaintiffs to redress wrongs even "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages . . . ." 445 U.S. at 339. Second, the Court observed that permitting pick-offs "would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement." *Id.* Both dangers appear to exist in the FLSA context, as well.

Yeboah, 2007 WL 3232509 at ** 2-3.

Similarly, in *Reyes v. Carnival Corp.*, 2005 WL 4891058 (S.D.Fla. May 25, 2005), the plaintiff sought relief on behalf of himself and others similarly situated under the FLSA. The defendant made an offer of judgment to the named plaintiff and moved to dismiss the action for lack of subject matter jurisdiction on the basis that the offer of judgment for more than complete relief rendered the case moot. The court disagreed, stating that "the defense strategy of providing an offer of judgment to the initial plaintiff in an FLSA collective action in order to bar the case from proceeding as to all similarly situated plaintiffs violates the very policies behind the FLSA . . . Permitting a defendant to evade a collective action by making an offer of judgment at the earliest possible time defeats the purpose of the collective action mechanism." *Reyes*, 2005 WL 4891058 at *3

Numerous other courts have recognized concerns with allowing a defendant to "pick off" individual claimants before class certification. *See, e.g., Rubery*, 494 F.Supp.2d at 180-81 ("In assessing whether dismissal is appropriate, this Court is mindful of the inherent danger that motions to dismiss grounded in a Rule 68 offer may be wielded as a strategic weapon

to frustrate the FLSA's very object—ensuring that every employee receives 'a fair day's pay for a fair day's work.'" (citation omitted)); *Guerra v. Big Johnson Concrete Pumping, Inc.*, 2006 WL 2290517, *3 (S.D.Fla. June 26, 2006)("[A]llowing Defendant's offers of judgment to moot this case is contrary to the broad remedial purpose of the FLSA and the specific purpose of section 216(b), which is to reduce the number of multiple lawsuits filed against the same employer."); *see also Morales v. Arcadia v. Shannon Produce Farms*, 237 F.R.D. 700 (S.D.Ga. 2006) (granting plaintiff's motion to invalidate defendant's offer of judgment served while Section 216(b) notice to the putative class was pending); *Roble v. Celestica Corp.*, 627 F.Supp.2d 1008 (D.Minn. 2007) (conditionally certifying FLSA collective action after Rule 68 offer of judgment); *Bah v. Shoe Mania, Inc.*, 2009 WL 1357223 (S.D.N.Y. May 13, 2009)(denying defendant's motion to dismiss based on mootness); *Bowens v. Atlantic Maintenance Corp.*, 546 F.Supp. 2d 55 (E.D.N.Y. 2008)(same).

Furthermore, as the District Court of Kansas has noted, one of the more troubling aspects of permitting defendants to use Rule 68 to "pick off" plaintiffs in a collective action is that such tactic essentially creates a "procedural loop" for FLSA plaintiffs. In *Geer v. Challenge Financial Investors Corp.*, 2006 WL 704993 (D.Kan. Mar. 14, 2006), the court explained this "procedural loop" as follows:

> It is possible for defendants to continue making offers of judgments to plaintiffs who opt in and then ask the court to consider dismissal based on the lack of subject matter jurisdiction. At the same time, plaintiffs may continue to introduce new plaintiffs whose presence will moot the issue

> of dismissal. Through the motion to dismiss, the court will be drawn into the parties' tussle over jurisdiction. . . Although nothing in the rules prevents parties from engaging in tactics to moot the case early on, this court is reluctant to allow defendants to bar the courtroom doors so early in the litigation.

Geer, 2006 WL 704933 at *3

The Supreme Court has identified the inherent dangers in allowing defendants to "pick off" individual plaintiffs in a representative action by utilizing a Rule 68 offer of judgment. Recognizing that the Supreme Court's rationale applies with equal force in the context of an FLSA collective action, courts around the country have disallowed the "picking off" of FLSA representative plaintiffs. Plaintiff respectfully suggests that these decisions, issued under factually identical circumstances to this case, are highly persuasive and should be followed.

E. Alternatively, And In Any Event, Dismissal Is Inappropriate At This Early Procedural Juncture

A plaintiff can only waive his or her rights under the FLSA with court approval or the approval of the Secretary of the Department of Labor. The Seventh, Eleventh and Federal Circuits have all found that purely private settlements of FLSA claims are unenforceable. *Walton v. United Consumers Club, Inc.*, 786 F.2d 303 (7th Cir. 1986); *Lynn's Food Stores, Inc. v. U.S.*, 679 F.2d 1350 (11th Cir. 1982); *O'Connor v. U.S.*, 308 F.3d 1233 (Fed.Cir. 2002); *cf. Lignore v. Univ. of Penn. Hospital*, 2007 WL 1300733, *3, n.7 (E.D.Pa. May 1, 2007)("Though our court of appeals has not decided the issue, in *Burke v. Wackenhut*

Corp., 2007 WL 694302, *2 (MD.Pa. Mar. 5, 2007), the court observed that 'in dicta, the Third Circuit has indicated that [wage] disputes may be settled privately, without court approval.' (*citing Coventry v. United States Steel Corp.*, 856 F.2d 514, 521 n. 8 (3d Cir. 1988))). There has been no review and/or approval by this Court of Defendants' offer of judgment to Plaintiff. To the extent that such a review and approval is necessary, Plaintiff suggests that it should occur after an appropriate record is set forth before the Court.

In *Luna v. Del Monte Fresh Produce (Southeast) Inc.*, 2008 WL 754452 (N.D. Ga. Mar. 19, 2008), plaintiffs sought relief on behalf of themselves and others similarly situated under the FLSA. The parties conducted limited discovery and plaintiffs filed a motion for certification as an FLSA collective action. Subsequently, 47 plaintiffs opted into the lawsuit. Defendants then served Rule 68 offers of judgment on 42 of the opt-in plaintiffs. The Northern District of Georgia, relying on *Lynn's Food Stores*, explained why the defendant's offers of judgment were procedurally premature and, thus, invalid:

> The Eleventh Circuit has held that FLSA claims may only be abridged or settled after a court reviews the proposed settlement to ensure that it is fair and reasonable. (citation omitted).
>
> . . .
>
> Defendants have not presented its Rule 68 offers to the Court for approval, with good reason. At this stage in the litigation, there is absolutely no basis for determining whether the offers are fair and reasonable. The parties have not conducted any merits discovery or provided even an

> estimate as to the amount plaintiffs might be entitled to recover on their FLSA and AWPA claims.

Id., 2008 WL 754452, *12.

This case is at an even earlier procedural juncture than in *Luna*. The Parties have not yet begun discovery. This Court held a Fed.R.Civ.P. 16 Pretrial Conference with counsel for the Parties on March 8, 2010. Following that conference, on March 10, 2010, this Court entered an order setting forth a discovery and motions practice schedule designed to address the conditional certification issues under Section 216(b). Consistent with the Supreme Court's admonition in *Roper* and the instruction set forth by the Third Circuit in *Weiss*, this Court should let the process for collective action certification "play out," pursuant to the process that it has created.

IV. CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction be DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 16th day of April, 2010, that the foregoing **Plaintiff's Brief in Opposition to Defendants' Motion to Dismiss for Lack of Subject-Matter Jurisdiction** was served on all counsel of record via the Court's electronic filing system.

/s/ Gary F. Lynch

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed 04/23/10]

Civil Action No.: 09-5782

LAURA SYMCZYK, an individual, on behalf of herself and others similarly situated,
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION, and ELDERCARE RESOURCES CORPORATION, d/b/a GENESIS ELDERCARE,
Defendants.

JURY TRIAL DEMANDED

FIRST AMENDED CLASS/COLLECTIVE ACTION COMPLAINT[1]

Plaintiff, Laura Symczyk, on behalf of herself and others similarly situated, alleges as follows:

1. This is a nationwide collective action under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*. ("FLSA"), brought on behalf of plaintiff and all other

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[1] Pursuant to Stipulated Court Order (D.E. # 8), Plaintiff herein amends this Complaint to, *inter alia*, incorporate the state causes of action originally brought in *Symczyk v. Genesis Healthcare Corp.*, No. 2:10-cv-1378-MMB ("State Case"). Accordingly, for purposes of determining the statute of limitations for Plaintiff's state law class claims, the date of the filing of the State Claim controls.

persons similarly situated pursuant to 29 U.S.C. §§ 207 and 216(b), specifically, as follows:

> All persons employed within the three years preceding the filing of this action by Defendants (as hereinafter defined), whose pay was subject to an automatic 30 minute meal period deduction even when they performed compensable work during the unpaid "meal break" (the "Collective Action Class").

2. In addition to the nationwide FLSA claims, Plaintiff brings this action as a state wide class action on behalf of all persons who, at any time during the past three years and up until the date of entry of judgment are or were employed by Defendants at any of Defendants' Pennsylvania facilities to recover all unpaid wages under the Pennsylvania Minimum Wage Act of 1968 ("MWA"), as amended, 43 Pa. C.S.C. §333.101-333.115; the Pennsylvania Wage Payment and Collection Law ("WPCL") 43 Pa. C.S.A. §260.1 *et seq.*; and Pennsylvania common law ("Pennsylvania state law claims").

3. Plaintiff brings the Pennsylvania state law claims as a class action pursuant to Rules 23(a) and (b) of the Federal Rules of Civil Procedure on behalf of the following persons similarly situated:

> All persons employed within the three years preceding the filing of this action by Defendants at any of its Pennsylvania facilities, whose pay was subject to an automatic 30 minute meal period deduction even when they performed compensable work during the unpaid "meal break" (the "PA State Law Class").

4. The Collective Action Class and the PA State Law Class are collectively referred to herein as the Classes.

5. As explained herein, under applicable employment laws, Plaintiff and members of the Classes are entitled to compensation for all hours worked. Despite this plain truth, and although Defendant regularly required Plaintiff and class members to work through all or part of their meal break, Defendant subjected Plaintiff and class members to automatic deductions for their scheduled meal breaks.

JURISDICTION AND VENUE

6. This Court has original jurisdiction over Plaintiffs FLSA claims pursuant to 29 U.S.C. §216(b) and 28 U.S.C. §1331.

7. This Court has original jurisdiction over Plaintiff's Pennsylvania state law claims pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. §1332(d)(2), because at least one member of the PA State Law Class is a member of a state that is different from at least one of the Defendants and the matter in controversy exceeds the sum or value of $5,000,000.

8. In addition, this Court has supplemental jurisdiction under 28 U.S.C. §1367 over the Pennsylvania state law claims because those claims derive from a common nucleus of operative facts.

9. Venue for this action properly lies in the Eastern District of Pennsylvania, pursuant to 28 U.S.C. §1391(b), because the claim arose in this judicial district.

PARTIES

10. Plaintiff, Laura Symczyk, is an adult individual residing in Philadelphia. Plaintiff was employed by Defendants from April, 2007 through December, 2007 and worked at Pennypack Center. She spent her time working as a Registered Nurse at the facility. While working for Defendants, Plaintiff was regularly required to perform compensable work during unpaid "meal breaks."

11. Plaintiff consents in writing to be a party to this collective action pursuant to 29 U.S.C. §216(b).

12. Genesis Healthcare Corporation ("Genesis") is an integrated skilled nursing center and assisted living communities enterprise headquartered at 101 E. State Street, Kennett Square, Pennsylvania. Genesis is comprised of 200 skilled nursing centers and assisted living communities throughout 13 eastern states.

13. Upon information and belief, Genesis is a parent corporation of Eldercare Resources Corporation, d/b/a Genesis Eldercare ("Eldercare"):

14. Genesis and Eldercare are related organizations through, for example, common membership, governing bodies, trustees and/or officers and benefit plans.

15. Upon information and belief, at all times, the wage and hour and all related employee compensation policies of Genesis and Eldercare are and were centrally and collectively dictated, controlled, and ratified.

16. Upon information and belief, Genesis and Eldercare share common management and have common ownership.

17. As such, Genesis and Eldercare are the employer—single, joint or otherwise—of the Plaintiff and class members.

18. For purposes of this complaint, Genesis and Eldercare are hereinafter collectively referred to as "Defendants."

19. Defendants have approximately 36,000 employees.

FACTUAL BACKGROUND

20. This action is filed on behalf of all non-exempt employees of Defendants whose pay is subject to an automatic meal break deduction even when they perform compensable work during their meal breaks. These persons include, but are not limited to, secretaries, housekeepers, custodians, clerks, porters, registered nurses, licensed practical nurses, nurses' aides, administrative assistants, anesthetists, clinicians, medical coders, medical underwriters, nurse case managers, nurse interns, nurse practitioners, practice supervisors, professional staff nurses, quality coordinators, resource pool nurses, respiratory therapists, senior research associates, operating room coordinators, surgical specialists, admissions officers, student nurse technicians, trainers, and transcriptionists employed at any of Defendants' facilities during the three years preceding the filing of this action.

21. Given the demands of the health care industry and staffing shortages, Defendants know that to get the tasks done that it .assigns to Plaintiff and class members, Plaintiff and class members have to work through their unpaid "meal breaks."

22. All non-exempt employees of Defendants are subjected to Defendants' "Meal Break Deduction Policy."

23. Upon information and belief, Defendants maintain the "Meal Break Deduction Policy" at all of its facilities.

24. Under the "Meal Break Deduction Policy," Defendants' computerized time and attendance system automatically deducts a 30 minute meal period per work shit

25. Under Defendants' "Meal Break Deduction Policy," Defendants improperly and illegally shift the burden to Plaintiff and class members to ensure that non-qualifying "meal breaks" are not deducted from their pay.

26. Plaintiff and- members of the Classes often perform compensable work for Defendants during their uncompensated "meal breaks."

27. Defendants do not ensure that, Plaintiff and members of the Classes are completely relieved of their work duties during their uncompensated "meal breaks."

28. Plaintiff and members of the Classes are routinely not completely relieved of their job duties during their uncompensated "meal breaks."

29. Plaintiff and members of the Classes routinely are required to stay at their duty post during their uncompensated "meal breaks."

30. Defendants do not prohibit Plaintiff and members of the Classes from working during their "meal breaks" and routinely suffers or permits Plaintiff and class members to perform such work.

31. Defendants routinely fail to ensure that unauthorized work is not being performed during employee "meal breaks."

32. In fact, although Defendants automatically deduct 30 minute meal periods, Defendants expect Plaintiff and members of the Classes to be available to work throughout their shifts and consistently require its employees to work during unpaid "meal breaks."

33. Plaintiff and members of the Classes are expected to eat without any change in demands from patients or relief by additional staff.

34. Plaintiff and members of the Classes are often required to respond to pages; as well as requests by patients, co-workers and management, during unpaid "meal breaks."

35. Defendants know and/or have reason to believe that Plaintiff and members of the Classes perform, work during their unpaid "meal breaks."

36. Plaintiff and members of the Classes perform work for Defendants, on Defendants' premises, in plain sight, and often at management's request during their unpaid "meal breaks."

37. Defendants have observed Plaintiff and members of the Classes working through their unpaid "meal breaks." Defendants have directed Plaintiff and members of the Classes to work during their unpaid "meal breaks."

38. Even though Defendants know that Plaintiff and members of the Classes are working during "meal breaks," Defendants fail to compensate Plaintiff and members of the Classes for their work, electing instead to sit back and accept the benefits of

Plaintiff and members of the Classes' uncompensated work.

39. Some evidence generally reflecting the number of uncompensated hours worked by each class member and the compensation rates for the relevant work periods is in the possession of Defendants.

40. While Plaintiff is unable to state at this time the exact amount owed to the class, Plaintiff believes that such information will become available during the course of discovery. When an employer fails to keep complete and accurate time records, employees may establish the hours worked solely by their testimony and the burden of overcoming such testimony shifts to the employer.

CLASS/COLLECTIVE ACTION ALLEGATIONS

41. The preceding paragraphs are incorporated by reference as if the same were fully set forth herein.

42. Plaintiff brings this action on behalf of the Collective Action Class as a collective action pursuant to the Fair Labor Standards Act, 29 U.S.C. §§ 207 and 216(6), and on behalf of the PA State Law Class for claims under the Pennsylvania Minimum Wage Act of 1968 ("MWA"), as amended, 43 Pa. C.S.C. §333.101-333.115; the Pennsylvania Wage Payment and Collection Law ("WPCL") 43 Pa, C.S.A. §260.1 *et seq.*; and Pennsylvania common law, as a class action pursuant to Fed.R.Civ.P. 23.

43. Regarding the Collective Action Class, Plaintiff specifically brings this FLSA collective action on behalf of herself and all other persons similarly situated pursuant to 29 U.S.C. §§ 207 and 216(b), as follows:

> All persons employed within the three years preceding the filing of this action by Defendant whose pay was subject to an automatic 30 minute meal period deduction even when they performed Compensable work during the unpaid "meal break."

Upon information and belief, Plaintiff believes that the definition of the class will be further refined following discovery.

44. Regarding the PA State Law Class, Plaintiff specifically brings this action on behalf of herself and all other persons similarly situated pursuant to Fed. R. Civ. P. 23, with the class consisting of:

> All persons employed within the three years preceding the filing of this action by Defendants at any of its Pennsylvania facilities, whose pay was subject to an automatic 30 minute meal period deduction even when they performed compensable work during the unpaid "meal break."

Upon information and belief, Plaintiff believes that the definition of the class will be further refined during the course of discovery.

45. The claims under the FLSA may be pursued by those who opt-in to this case pursuant to 29 U.S.C. §216(b). The claims under the MWA, WPCL, and Pennsylvania common law may be pursued by all similarly-situated persons who do not opt-out of the PA Class pursuant to Fed.R.Civ.P. 23.

46. The members of each of the Classes are so numerous that joinder of all members is impracticable. While the exact number of the members of the Classes is unknown to Plaintiff at this time, and can

only be ascertained through appropriate discovery, Plaintiff believes there are thousands of individuals in each defined class.

47. There are questions of law and fact common to the Classes which predominate over any questions affecting individual members only. These factual and legal questions include:

a. Whether Plaintiff and class members were expected to and/or mandated to regularly work during unpaid meal breaks;

b. Whether Defendant failed to pay Plaintiff and class members for all hours that they worked because of the fact that they automatically deducted 30 minute meal periods despite the fact that Plaintiff and members of the Classes regularly performed compensable work during "meal breaks";

c. Whether Defendant failed to pay Plaintiff and members of the Classes all overtime compensation due to them by virtue of their "Meal Break Deduction Policy";

d. The correct statute of limitations for Plaintiff's and members of the Classes' claims;

e. The correct method of calculating back overtime pay;

f. Whether Plaintiff and members of the Classes are entitled to compensatory damages, and if so, the means of measuring such damages;

g. Whether Plaintiff and members of the Classes are entitled to restitution;

h. Whether Defendant is liable for pre-judgment interest; and

i. Whether Defendant is liable for attorney's fees and costs.

48. Defendants have acted and refused to act on grounds generally applicable to the Classes.

49. The claims of the representative Plaintiff are typical of the claims of the Classes in that Plaintiff was denied overtime wages as a result of Defendants' uniform policy of not compensating its non-exempt employees for all hours worked. This is the predominant issue which pertains to the claims of each and every class member.

50. The class action/collective action mechanism is superior to other available methods for a fair and efficient adjudication of the controversy. The damages suffered by individual members of the Classes may be relatively small when compared to the expense and burden of litigation, making it virtually impossible for members of the Classes to individually seek redress for the wrongs done to them.

51. Furthermore, even if any member of the Classes could afford individual litigation against Defendants, it would be unduly burdensome to the judicial system. The instant methodology, when compared to voluminous individual actions, has fewer management difficulties and provides the benefits of unitary adjudication, economies of scale, and comprehensive supervision by a single court. Concentrating this litigation in one forum will promote judicial economy and parity among the claims of individual members of the Classes and provide for judicial consistency.

52. Plaintiff will fairly and adequately protect the interests of the Classes, as her interests are in complete alignment with those of the entire class, i.e., to prove and then eradicate Defendants illegal

employment practice of not paying overtime wages to their non-exempt employees.

53. Counsel for Plaintiff will adequately protect the interests of the Classes. Such counsel is experienced with employment/class litigation and has previously served as class counsel in employment litigation.

54. Plaintiff and the Classes she represents have suffered and will continue to suffer irreparable damage from the illegal policy, practice and custom regarding Defendants' pay practices.

55. Defendants have engaged in a continuing violation of the FLSA.

56. Plaintiff, as well as the individuals she represents, was denied overtime wages as a result of Defendants' pay practices. This violation was intended by Defendants and was willfully done.

57. Defendants' action in denying overtime wages to Plaintiff was intentional and constitutes a willful violation of the FLSA.

58. Defendant has engaged in a continuing violation of the MWA and the WPCL.

59. Defendants' action in denying wages for all hours worked was intentional and constitutes a willful violation of the MWA.

60. Defendants' action in denying overtime wages to Plaintiff was intentional and constitutes a willful violation of the MWA and the WPCL.

COUNT I—FLSA

61. The allegations set forth in the preceding paragraphs are incorporated herein.

62. At all relevant times, Defendants have been an employer engaged in interstate commerce consistent with 29 U.S.C. §§206(a) and 207(a). At all relevant times, Defendants employed Plaintiff and each member of the Collective Action Class consistent with the terms of the FLSA.

63. At all relevant times, Defendants have had annual gross revenues in excess of $500,000.00.

64. As a consequence of Defendants' employment practices whereby it automatically deducts thirty minutes for meal breaks from the pay of hourly, non-exempt employees, Plaintiff and class members were denied statutory overtime wages.

65. Plaintiff and class members were employees of Defendants within the meaning of the FLSA and, as such, were entitled to the benefits of the FLSA's overtime wage requirements.

66. Defendants' policy of denying Plaintiff and class members overtime wages represents and results in a violation of the FLSA's minimum wage requirements.

67. Defendants have failed to pay appropriate overtime wages under the FLSA.

WHEREFORE, Plaintiff respectfully requests:

A. All applicable statutory damages;

B. A Declaration that Defendants have violated the FLSA;

C. An Order designating this action as a collective action and directing the issuance of notice pursuant to 29 U.S.C. §216(b);

D. An Order appointing Plaintiff and her counsel to represent those individuals opting in to the collective action;

E. An Order awarding counsel for Plaintiff reasonable attorneys' fees and costs; and

F. Any further relief which the Court deems appropriate under the circumstances.

COUNTII-MWA

68. The allegations set forth in the preceding paragraphs are incorporated herein.

69. The MWA provides in relevant part:

> "Employees shall be paid for overtime not less than one and one-half times the employee's regular rate as prescribed in regulations promulgated by the secretary."

43 P.S. §333.104(c).

70. As a consequence of Defendants' employment practices whereby it automatically deducts thirty minutes for meal breaks from the pay of hourly, non-exempt employees, Plaintiff and class members were denied statutory overtime wages.

71. Plaintiff and class members were employees of Defendants within the meaning of the MW A and, as such, were entitled to the benefits of the MWA's overtime wage requirements.

72. Defendants are employers within the meaning of the MWA.

73. Defendants' policy of denying Plaintiff and class members overtime wages represents and results in a violation of the MWA's minimum wage requirements.

74. Defendants have failed to pay appropriate overtime wages under the MWA.

WHEREFORE, Plaintiff respectfully requests:

A. That Defendants' conduct be declared to be in violation of the MWA;

B. That Plaintiff and class members are granted a permanent injunction enjoining Defendants, its officers, agents, successors, employees, attorneys, assigns, and other representatives, and all those acting in concert with it at its direction, from engaging in any employment policy or practice which violates the MWA;

C. That Defendants be ordered to make whole those persons adversely affected by the policies and practices described herein by providing appropriate back pay, and reimbursement for lost wages in an amount to be shown at trial;

D. That Defendants be ordered to pay appropriate back pay to Plaintiff and class members;

E. An Order designating this action as a class action;

F. An Order appointing Plaintiff and her counsel to represent the class;

G. Award counsel for Plaintiff reasonable attorneys' fees and costs; and H. Award any further relief which the Court deems appropriate under the circumstances.

COUNT III -WPCL

75. The allegations set forth in the preceding paragraphs are fully incorporated herein.

76. The WPCL provides in relevant part:

> "Every employer shall pay all wages, other than fringe benefits and wage supplements, due to his employees on regular paydays designated in advance by the employer. . . . All wages, other

> than fringe benefits and wage supplements, earned in any pay period shall be due and payable within the number of days after the expiration of said pay period as provided in a written contract of employment or, if not so specified, within the standard time lapse customary in the trade or within 15 days from the end of such pay period. The wage shall be paid in lawful money of the United States or check, except that deductions provided by law, or as authorized by regulation of the Department of Labor and Industry for the convenience of the employer, may be made. . ."

43 P.S. §260.3.

77. Plaintiff and class members are/were employees of Defendants within the meaning of the WPCL and, as such, are entitled to timely payment of wages due to them.

78. Defendants are employers within the meaning of the WPCL.

79. Defendants' policy of subjecting Plaintiffs' and class members' pay to automatic meal break deductions even when they performed compensable work results in a violation of the WPCL.

80. Plaintiff and class members have entered into an unwritten agreement with Defendants pursuant to which Plaintiff and class members are to receive certain wages, in compensation for their work for Defendants.

81. Defendants' failure to pay wages for every hour worked, as required by Pennsylvania law, represents a violation of its oral agreement with Plaintiff and class members.

WHEREFORE, Plaintiff respectfully requests;

A. That Defendants' conduct be declared to be in violation of the WPCL;

B. That Plaintiff and class members be granted a permanent injunction enjoining Defendants, its officers, agents, successors, employees, attorneys, assigns, and other representatives, and all those acting in concert with it at its direction, from engaging in any employment policy or practice which violates the WPCL;

C. That Defendants be ordered to make whole those persons adversely affected by the policies and practices described herein by providing appropriate back pay, and reimbursement for lost wages in an amount to be shown at trial;

D. That Defendants be ordered to pay appropriate liquidated damages to Plaintiff and class members;

E. An Order designating this action as a class action;

F. An Order appointing Plaintiff and her counsel to represent the class;

G. Award counsel for Plaintiff reasonable attorneys' fees and costs; and

H. Award any further relief which the Court deems appropriate under the circumstances.

COUNT IV -UNJUST ENRICHMENT

82. The allegations set forth in the preceding paragraphs are fully incorporated herein.

83. Plaintiff brings this Count III in the alternative to her claim under the WPCL.

84. Plaintiff and class members were not paid wages for every hour that they worked.

85. Defendants retained the benefits of Plaintiff's and class members' uncompensated work under circumstances which rendered it inequitable and unjust for Defendants to retain such benefits without paying for their value.

86. Defendants were unjustly enriched by requiring Plaintiff and class members to work hours for which they were not compensated.

WHEREFORE, Plaintiff respectfully requests:

A. That Defendants are declared to have been unjustly enriched;

B. That Defendants be ordered to pay back to Plaintiff and the class the amounts representing its unjust enrichment;

C. An Order designating this action as a class action;

D. An Order appointing Plaintiff and her counsel to represent the class;

E. Award counsel for Plaintiff reasonable attorneys' fees and costs; and

F. Award any further relief which the Court deems appropriate under the circumstances.

Dated: April 23, 2010

Respectfully submitted

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed: 04/30/10]

Case No. 2:09-cv-05782-MMB

LAURA SYMCZYK,
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION and ELDERCARE RESOURCES CORPORATION,
Defendants.

Honorable Michael M. Bayison
(Filed via Electronic Case Filing System)

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

On March 23, 2010, Defendants Genesis HealthCare Corporation and ElderCare Resources Corporation (collectively, "Defendants") moved to dismiss this Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("FLSA") lawsuit because Plaintiff Laura Symczyk ("Ms. Symczyk") rejected a Rule 68 Offer of Judgment (the "Offer") that provided her with complete relief for any and all of her alleged damages, fees, and costs. In response, Ms. Symczyk notably does not contest the sufficiency of Defendants' Offer, *i.e.* she makes no claim that the Offer does not exceed her

maximum potential recovery. Instead, she attacks Defendants' strategy in issuing the Offer. She asserts it is an attempt to "pick-off" Ms. Symczyk's claim before this Court can render a conditional decision on FLSA collective (not class) certification.

Ms. Symczyk misses the point. In her failed attempt to demonstrate some perceived unfairness of the impact of the Offer, she blurs, if not outright confuses, the significant procedural differences involved in litigating purported collective claims under the FLSA as opposed to class claims under Fed. R. Civ. P. 23. Rule 23 does not apply to this case and, as explained below, its inapplicability is not a distinction without a difference. Thus, it remains: where, as here, the Offer fully resolves the plaintiff's claim, the plaintiff has not yet moved for certification, conditional or otherwise, and not a single individual has even attempted to join the action, courts regularly dismiss such cases. Accordingly, this Court should honor Congress's intent to prohibit class actions under the FLSA and dismiss Ms. Symczyk's ELSA claim in its entirety.

I. THE OFFER COMPLETELY MOOTS MS. SYMCZYK'S FLSA CLAIM COMPELLING ITS DISMISSAL FOR LACK OF SUBJECT-MATTER JURISDICTION

Ms. Symczyk's primary argument in opposition to Defendants' Motion is that even if the Offer moots her FLSA claim, this Court cannot dismiss her case because she allegedly represents a group of potential plaintiffs. More specifically, she asserts that purported Rule 23 class action policy insulates her from Defendants' Motion to Dismiss. Although she acknowledges that the Third Circuit has not squarely addressed the issue in the context of the ELSA, she

asserts that the reasoning set forth in *Weiss v. Regal Collection*, 385 F.3d 337 (3d Cir. 2004), a Rule 23 case, applies with equal force to purported FLSA collective actions. She is wrong[1]

As an initial matter, *Weiss* (a nonbinding decision) is distinguishable. *Weiss* addresses whether a Rule 68 offer made to the named plaintiff before filing an answer rendered putative class claims under the Fair Debt Collection Practices Act moot. It is distinguishable for at least two reasons. First, in contrast to the situation here, the offer did not provide complete relief *Id.*, at 342 (explaining that "the Rule 68 offer did not provide the maximum damages to the putative class."). Second, as numerous courts have explained, the Rule 23 class action principles expounded upon in *Weiss* are of no help to Ms. Symczyk. They are fundamentally different from, and mutually exclusive of, principles governing litigation under Section 216(b) of the FLSA. Indeed, even *Weiss* recognizes that it is the named plaintiff's class *representative* role which impacts the Rule 68 analysis:

> As sound as is Rule 68 when applied to individual plaintiffs, its application is strained when an offer of judgment is made to a class **representative**. . . . [A]llowing the defendants here to 'pick off' a **representative plaintiff** with an offer of judgment less than two months after the complaint is filed may undercut the viability of the class action procedure, and frustrate the

[1] Ms. Symczyk appears to chide Defendants for not referencing *Weiss* in their Opening Brief. Defendants did not cite *Weiss* by name, however, because there is no need. Its reasoning simply does not apply in FLSA actions. Regardless, Defendants clearly noted exceptions to the moonless doctrine under Rule 23, even stating they expected Plaintiff to rely on them erroneously.

> objectives of this procedural mechanism for aggregating small claims, . . ."

Weiss, 385 F.3d at 342 (emphasis added). This excerpt reveals precisely why *Weiss* and its reasoning have no application to FLSA cases. Specifically, concerns regarding putative class members in Rule 23 class actions are not properly incorporated into the FLSA collective action analysis.

First, the FLSA does not recognize representative or class actions. Accordingly, "representative plaintiffs" do not exist under the FLSA. When Congress first adopted the opt-in model for collective actions in 1947 through the Portal-to-Portal Act, it did so expressly intending to eliminate the possibility of opt-out (Rule 23) class actions. *See* Portal-to-Portal Act of 1947, pt. IV, § 5, 61 Stat. 84, 87, 88 (1947); *see also* 29 U.S.C. § 216(b) ("No employee shall be a party plaintiff to any such action **unless** he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.") (emphasis added). Tellingly, the title which Congress assigned to the relevant statutory provision, "Representative Actions Banned," illustrates well that Congress's purpose in adding the opt-in language to FLSA collective actions was to prohibit precisely what is allowed under Rule 23 — a plaintiff seeking to pursue claims on a representative basis, *i.e.* on behalf of absent putative class members. Pub. L. 49, ch. 52 § 61 Stat. 84, 87 (1947). Congress explained that without a ban on representative class actions like those addressed in *Weiss,* "the courts of the country would be burdened with excessive and needless litigation." Employers would be faced with "vast allegations of liability. . . . . brought on behalf of employees who had no real involvement in, or

knowledge, of the lawsuit." Portal-to-Portal Act of 1947 § 1(a)(7), *codified* at 29 U.S.C. § 251(a)(7); *see also Hoffman-La Roche, Inc. v. Sterling*, 493 U.S. 165, 173 (1989)("[t]he relevant [1947] amendment was for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions."); *Arrington*, 531 F. Supp. at 501 ("[T]he purpose of the ban on representative actions was to prevent large group actions, with their vast allegations of liability, from being brought on behalf of employees who had no real involvement in, or knowledge of, the lawsuit"); *Bartels v. Piel Bros.*, 74 F. Supp. 41, 44 (E.D.N.Y. 1947) (same). In short, by enacting Section 216(b), Congress intended to prohibit resolution of FLSA claims by any means other than direct adjudication.[2] Accordingly, refusing to dismiss Ms. Symczyk's FLSA claim would contravene Congress's intent.

Second, *Weiss* notes the policy interest in ensuring that Rule 68 offers of judgment do not frustrate Rule 23's interest in promoting the aggregation of small claims. No such policy interests exist under the FLSA. The FLSA, although a remedial statute, envisions individual — and not representative — claims. It requires active and affirmative participation by

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[2] Although the FLSA does not permit representative actions, the statute provides multiple avenues of relief for aggrieved employees. The FLSA allows individual employees, on their own or by opting in to a collective action, to recover unpaid wages, an additional amount of liquidated damages (equal to the unpaid wages) where appropriate, and a mandatory award of costs and reasonable attorneys' fees to a prevailing plaintiff. *See* 29 U.S.C. § 216(b). An aggrieved employee may also file a claim with the United States Department of Labor, which has authority to advocate on behalf of the employee. 29 U.S.C. § 216(c).

claimants, and entitles each claimant to an award of attorney's fees and costs, as well as liquidated damages, upon a successful result. 29 U.S.C. § 216(b). FLSA claimants simply need not concern themselves, as the court did in *Weiss,* with the relative size of the claim and/or allocating fees and costs among a large group. *Weiss,* 385 F.3d at 344-345. This is because FLSA claimants are amply compensated in each case for all unpaid wages, damages, fees and costs. Moreover, any suggestion that putative claimants cannot prosecute their own actions is belied by reality. The last ten years have seen an explosion of wage and hour litigation. Thus, not only is no one deterred from litigating wage and hour claims, but court-filing statistics demonstrate that a ready and willing supply of lawyers exists to handle these fee-shifting cases.

For these reasons, among others, most courts have refused to extend *Weiss* to FLSA cases. For example, in rejecting the identical argument Ms. Symczyk makes here, the court in *Darboe* explained:

> . . . *[Weiss]* is distinguishable because it was decided in the context of a class action maintained pursuant to Rule 23 of the Federal Rules of Civil Procedure ("Rule 23") and not, as here, an FLSA collective action commenced pursuant to 29 U.S.C. § 216(b). In a Rule 23 action, once a class is certified, all those falling within the description of the class certified are deemed a part of the case and will be bound by the outcome unless they take the affirmative action of opting out of the matter. *See* FRCP 23(c)(2)(B) (setting forth notice to class members as to procedure for exclusion from the class). In contrast, an FLSA collective action requires members of the class to

> take the affirmative step of "opting in" to the action to be a pan of the action and bound by its terms. Where no class member has opted in to the collective action, the named plaintiff is deemed to represent himself only. In such cases, application of Rule 68 to moot a single plaintiff's claim creates no conflict with the policy underlying the collective action procedure.

Darboe v. Goodwill Indusls. of Greater N.Y. & Northern NJ, Inc., 485 F. Supp. 2d 221, 223-24 (E.D.N.Y. 2007) *(citing Vogel,* 371 F. Supp. 2d at 127; *Ward,* 455 F. Supp. 2d, at 267)).

Because *Weiss* is of little moment in an FLSA case, courts confronted with solitary individuals claiming to represent a collection of plaintiffs under the FLSA routinely dismiss such cases when those individuals are presented with an offer of judgment that meets or exceeds their possible demands. In dismissing such cases, courts concern themselves with three issues: (1) does the offer of judgment fully satisfy the plaintiff's claim; (2) is a motion for conditional certification pending; and (3) have additional plaintiffs stepped forward to join in the claim. *See Briggs v. Arthur T. Mott Real Estate LLC,* 2006 U.S. Dist. LEXIS 82891, *6-7 (E.D.N.Y. 2006) ("While the Second Circuit ha[s] not ruled on the issue of mootness when an offer of judgment is made in an FLSA collective action, other courts have" and "[i]n those cases where no other similarly situated individuals have opted in and the offer of judgment satisfies all damages of the plaintiff, plus all costs and attorney's fees, the courts have held that a Rule 68 offer of judgment moots an FLSA collective action thereby depriving the court of subject matter jurisdiction.") *citing Ward,* 2006 U.S. Dist. LEXIS 75665, 2006 WL 2925650, at *4-6; *Vogel,*

371 F. Supp. 2d 122, 128 (D. Conn. 2005); *Mackenzie*, 276 F. Supp. 2d 1211, 1213 (M.D. Fla. 2003).

Where, as here, there is no contention that the Offer does not fully satisfy the claim; no one has opted-in to the action; and no motion for conditional certification is pending, courts have not hesitated to dismiss FLSA claims for lack of subject matter jurisdiction. Indeed, *every* case Ms. Symczyk cites for the proposition that dismissal is inappropriate only refused to dismiss the action when at least one of these three conditions was not met, *i.e.*, where it was unclear whether the Rule 68 offer fully satisfied the plaintiff's claims, where others had opted-in to the action, or where the plaintiff had already filed a motion for conditional certification under Section 216(b).[3] Because only Ms. Symczyk's individual claim

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[3] *See, e.g., Nash v. CVS Caremark Corp., et al,* 2009 U.S. Dist. LEXIS 109437 (D. RI. Nov. 16, 2009) (denying motion to dismiss purported FLSA collective action based on offer of judgment to named plaintiff where four individuals had opted-in to case and offer did not moot their claims); *Bowens v. Alt. Maint. Corp.*, 546 F. Supp. 2d 55, 58 (E.D.N.Y. 2008) (denying motion to dismiss based on offer of judgment where a motion for conditional certification was pending and clear evidence existed at outset of case that other individuals were interested in joining case as six employees opted-in but later withdrew); *Yeboah v. Central Parking System,* 2007 WL, 3232509 (E.D.N.Y. Nov. 1, 2007) (additional individual opted-in to action while motion to dismiss pending); *Rubery v. Buth-Na-Bodhaige, Inc.*, 494 F. Supp. 2d 178 (W.D.N.Y. 2007) (more than fifty consent forms filed by putative collective action members); *Robles* v. *Celestica Corp.*, 627 F. Supp. 2d 1008 (D. Minn. 2007) (denying motion to dismiss FLSA collective action based on offer of judgment served after motion for conditional certification was filed and other individuals had sought to join *case); Guerra v. Big Johnson Concrete Pumping Inc.*, 2006 WL 2290517 (S.D. Fla. June 16, 2006) (declining to find FLSA action moot where another employee opted-in to ease at time defendant made offer of judgment);

is at stake, and Defendants' Offer represents all that she could hope to recover (and more) through litigation, her claim is moot. There is simply no justification for taking the time of the Court, Defendants and Ms. Symczyk in further pursuit of a claim that Defendants have satisfied fully in Ms. Symczyk's favor.

II THE RELATION BACK DOCTRINE DOES NOT SAVE PLAINTIFF'S CASE FROM DISMISSAL.

Implicitly recognizing that her individual claim is moot, Ms. Symczyk asserts that this Court's inquiry should not stop there. She argues that the "relation back" doctrine under Fed. R. Civ. P. 23, as applied in *Weiss,* should operate with equal force in this FLSA case, and thus save her claim from dismissal. Rule 23's relation back doctrine, however, has no application under Section 216(b) of the FLSA.

Although Ms. Symczyk argues otherwise, the logical underpinnings of the relation back doctrine hinge on concepts inapplicable to FLSA actions.

Morales-Aracadio v. Shannon Produce Farms, 237 F.R.D. 700 (S.D. Ga. 2006) (denying motion to dismiss where defendant served offer of judgment after court certified collective action and authorized notice to be sent to similarly situated employees); *Geer v. Challenge Financial Investors Corp.,* 2006 WL 704993 (D. Kan, Mar. 14, 2006) (stating dismissal inappropriate where third plaintiff gave notice to court of her intent to opt-in after first two plaintiff had received offers of judgment and court was uncertain that amount offered fully satisfied claims at issue); *Reyes v. Carnival Cozp,,* 2005 U.S. Dist. LEXIS 11948, *8 (S.D. Fla. May 25, 2005) (concluding live controversy existed where "there is no basis for [the court] to conclude that the offer of judgment is definitively more than the Plaintiff could recover at trial, . . ." and two other individuals opted-in to case after offer made).

Unlike FLSA putative claimants, Rule 23 putative class members are entitled to certain protections upon the filing of a class action complaint. The statute of limitations is tolled for all putative class members and, at least in Pennsylvania and certain other jurisdictions, putative Rule 23 class members are deemed represented by counsel upon filing of a class complaint, entitling them to certain fiduciary protections as well. *See Dondore v. NGK Metals, Inc.*, 152 F. Supp. 2d 662 (E.D. Pa. 2001). Thus, in a Rule 23 *case,* to the extent an early offer of judgment moots a putative class action, it potentially impacts the rights of all putative class members. The statute of limitations will no longer be tolled, and putative class members may need to take prompt and unexpected action to protect their rights. Consequently, the "picking off" of class plaintiffs about which the *Weiss* court and others seemingly express concern has actual consequences for absent putative class members.

In contrast, dismissal of an FLSA named plaintiff impacts the rights of no one other than the named plaintiff. The filing of the action tolls the limitations period for no one. If a court dismisses an alleged FLSA collective action, other claimants are free, as they always are, to file their own claim without prejudice to their rights. Although dismissing such claims may ultimately impact a court's interest in avoiding multiplicity of litigation, such an interest cannot, as a matter of law, give life to an otherwise moot claim. In other words, the Court's interest in avoiding repetitive litigation cannot create a case or controversy where by law none exists. *See Powell v. McCormack,* 395 U.S. 486, 496 (1969) (stating case becomes moot, and incapable of judicial resolution, "when the issues presented are no longer 'live' or the

parties lack a legally cognizable interest in the outcome."). Further, any such interest is minimized here because, despite the fact that this case has been pending for five months, not one other person has expressed any interest in participating.

Moreover, the relation back doctrine under Rule 23 should not apply in FLSA cases for other reasons as well. Named plaintiffs in Section 216(b) cases have no procedural right, independent of their own claims, in a collective action. As originally enacted in 1938, the FLSA allowed employees and others (such as unions) to sue in a "representative" capacity on behalf of unidentified employees, similar to actions brought under Rule 23. *Arrington v. NBC,* 531 F. Supp. 498, 500 (D.D.C. 1982), In the Portal-to-Portal Act of 1947, however, Congress deliberately amended Section 216(b) to bar such "representative actions." *See Cameron-Grant v. Maxim Healthcare Servs., Inc.,* 347 F.3d 1240, 1248 (11th Cir. 2003) *(per curiam)* (citing *Arrington,* 531 F. Supp. at 500); *see also* Portal-to-Portal Act of 1947, ch. 52, §§ 5(a), 6, 7, 61 Stat. 87-88; 93 Cong. Rec. 538, 2182 (1947) (remarks of Sen. Donnell). This is precisely why nowhere in the FLSA or any implementing regulation is the concept of "class certification" mentioned. Nor does the Supreme Court even mention the word "certification," or any variation of that word, in its seminal opinion expounding on opt-in actions, *Hoffmann-LaRoche, Inc. v. Sperling, et al.,* 493 U.S. 165 (1989). Rather, the class certification (or "conditional certification") nomenclature, which courts seemingly apply to the FLSA, is judicially created; its use has no tie to the actual language in *Sperling,* Section 216(b) or any other FLSA provision. Indeed, the label "certification" is entirely inappropriate under the FLSA because "the only real issue, is whether and whom the court

should assist in providing notice of the action. That decision can be made without the gratuitous act of 'conditionally certifying' the class. . . ." Allan G. King and Camille C. Ozumba, *"Strange Fiction: The "Class Certification" Decision in FLSA Collective Actions,"* 24 Lab. Law 257 at 280 (Winter/Spring 2009). The wholesale adoption of class certification terminology by courts in FLSA cases, without considering the possible repercussions of the terms, has clearly lead to erroneous reasoning. This is no better exemplified than in *Sandoz v. Cingular Wireless LLC,* 553 F.3d 913 (5th Cir. 2008), a case on which Ms. Symczyk's relation back argument relies.[4]

In *Sandoz,* while recognizing that the defendant's Rule 68 offer of judgment mooted plaintiff's claim, the court applied the "relation back doctrine," initially articulated in *Sosna v. Iowa,* 419 U.S. 393 (1975), to find that the plaintiff had standing to pursue collective certification of the alleged FLSA action notwithstanding her lack of personal interest in the claim. In doing so, however, the court erroneously applied Rule 23 concepts to claims under Section 216(b). The result is a flawed holding, the error of which is clear on the face of the opinion. Specifically, the *Sandoz* court states:

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[4] *Sandoz* actually supports Defendants' position that Ms. Symczyk's claim is moot. *See Id.,* at 919 ("the language of § 216(b) and the cases construing that provision demonstrate that Sandoz cannot represent any other employees until they affirmatively opt-in to the collective action. This means that when Cingular made its offer of judgment, Sandoz represented only herself, and the offer of judgment fully satisfied her individual claims. If our analysis stopped there, Sandoz's case would be moot.").

> The issue in this appeal is whether a FLSA claim becomes moot when the purported representative of a collective action receives an offer that would satisfy his or her individual claim and no other plaintiffs have opted in to the collective action. Therefore, we must determine whether Sandoz represents only herself in this claim or if she also represents other similarly-situated employees in a FLSA collective action.
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> * * *
>
> . . . the differences between class actions and *FLSA § 216(b)* collective actions do not compel a different result regarding whether a certification motion can 'relate back' to the filing of the complaint. . . . Although the differences between *Rule 23* class actions and *FLSA § 216(b)* collective actions alter the conceptual moonless inquiry, each type of action would be rendered a nullity if defendants could simply moot the claims as soon as the **representative** plaintiff files suit. Thus, the policies behind applying the 'relation back' principle for *Rule 23* class actions apply with equal force to *FLSA § 216(b)* collective actions.

553 F.3d at 921 (emphasis added).

What is striking about both *Sandoz's* framing of the issue, and its ultimate reasoning, is that the court grounds both in the erroneous assumption that an FLSA named plaintiff at any point in the litigation, is a "representative" plaintiff. Plaintiffs in FLSA cases are NOT — at any point — representative plaintiffs, regardless of the procedural posture of the case. Moreover, unlike class certification under Rule 23, "certification" as that term is commonly used

under the FLSA, does not bind anyone — no one is "in" the case unless they affirmatively choose to be and it does not transform the FLSA action into a "representative" one, as with Rule 23 actions. This is because the FLSA is clear: representative actions are banned. *See* Pub. L. 49, ch. 52 § 61 Stat. 84, 87 (1947). Accordingly, the central premise underpinning the *Sandoz* ruling is simply erroneous.[5]

Rather, because a Section 216(b) plaintiff has no procedural right to represent others, a plaintiff's reliance on collective action allegations cannot provide a personal stake or interest that prevents dismissal of the case on mootness grounds. *See Cameron-Grant,* 347 F.3d at 1249; *Vogel v. Am. Kiosk Mgmt.,* 371 F. Supp. 2d 122, 128 (D. Conn. 2005). In *Cameron-Grant,* the Eleventh Circuit carefully analyzed this issue and reached the following conclusion: "[A] 216(6) plaintiff . . . presents only a claim on the merits. In contrast to the Rule 23 plaintiff a 216(b) plaintiff has no claim that he is entitled to represent other plaintiffs. Accordingly, because [the plaintiff] has no remaining personal claims, this action is moot." 347 F.3d at 1249.

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[5] Ms. Symczyk cites *Nash v. CVS Caremark Corp., et al.,* 2009 U.S. Dist. LEXIS 109437 (D. R.I. Nov. 16, 2009) as supporting application of the relation back doctrine in a case such as this. *Nash,* however, does not mention the doctrine or even cite *Weiss* or *Sandoz. In* fact, based on the facts here (no opt-ins and no pending certification motion), the Nash court concedes that First Circuit precedent would have compelled it to dismiss the plaintiff's claim as moot. *See Cruz v. Farquharson,* 252 F.3d 530 (1st Cir. 2001) (dismissing Rule 23 class action as moot where all named plaintiffs had received complete relief and no motion for *class certification* was pending).

In *Cameron-Grant,* after the district court denied class certification, the lone remaining plaintiff settled his FLSA claim but claimed "representative status" and sought to appeal that denial. The Eleventh Circuit considered first whether the plaintiff's claims on appeal were moot. It recognized that "[i]n the Rule 23 class action context, . . . unique mootness principles may apply," and the named plaintiff had he sought to certify a Rule 23 "representative" or "opt-out" class would have had standing to appeal the denial of a Rule 23 motion for class certification. 347 F.3d at 1244 (emphasis added); *see also id.* at 1245-47. While recognizing that a Rule 23 named plaintiff may act as a private attorney general and has "a procedural right to represent a class," the Eleventh Circuit held that an FLSA Section 216(b) plaintiff "has no claim that he is entitled to represent other plaintiffs." *Id.* at 1249. Thus, even in an alleged collective action, if an FLSA plaintiff has been "fully paid . . . all claimed unpaid wages and overtime [wages], liquidated damages equal to that amount, and . . . costs and attorneys' fees" *(id.* at 1244), then the plaintiff "has no remaining personal claims, and [the] action is moot." *Id.* at 1249; *see also Simmons v. United Mortgage & Loan,* 2009 WL 2950879 at *3 (W.D.N.C. Sep. 14, 2009) (granting motion to dismiss after offer of judgment on FLS A claims rejected, despite fact that plaintiffs filed motion for conditional certification before motion to dismiss was filed, relying in part on the difference between Rule 23 class actions and FLSA collective actions: "The 'fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by FLSA § 16(b)' counsels against borrowing from the Rule 23 setting and imposing limitations on the offer of judgment

rule in the FLSA setting.") (quoting *Vogel*, 371 F. Supp. 2d at 127).[6]

In sum, because Ms. Symczyk has no procedural right to represent others, practical concerns regarding judicial efficiency and preserving the Congressional intent behind FLSA collective actions do not allow this case to survive application of the mootness doctrine. *See Geer*, 2006 WL 704993 at *8-9 (acknowledging that where no opt-ins exist, application of Rule 68 to moot a single plaintiff's claim creates no conflict with policy underlying collective actions); *see also Duffy v. Quattrocchi*, 576 F. Supp. 336, 342 (D.R.I. 1983) (stating absent personal stake in the outcome, plaintiff's policy argument could not save suit from dismissal on mootness grounds). There is, accordingly, no principled basis for this Court refraining from applying ordinary mootness rules and dismissing this case. *See Cameron-Grant*, 347 F.3d at 1240;

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[6] To the extent Ms. Symczyk argues that, as a matter of policy, this Court should not dismiss her claim because doing so undermines the FLSA's collective action device, that argument is of no moment where, as here, the plaintiff has no personal stake in the outcome of the action. Where a plaintiffs claims are moot, and her arguments are "pitched on policy considerations," "the courts cannot be placed in a position of issuing what would amount to advisory opinions. . . ." *See Duffy, v. Quattrocchi*, 576 F. Supp. 336, 342 (D.R.I. 1983). Moreover, Ms. Symczyk's argument that this Court should allow her to proceed with a collective action without any remaining personal stake ignores the plain language of Section 216(b) and case law confirming that named plaintiffs in FLSA cases have no representative status or rights over the claims of others. *See also Brown v. Sears Holdings Mgmt. Corp.*, C.A. No. 1:09-cv-02203 (N.D. Ill. Aug. 17, 2009) (dismissing collective action allegations from case based on release, explaining "the mere fact that class actions are mentioned within § 216(b) does not create a 'right' for a plaintiff to bring a class action").

Ward v. Bank of N.Y., 455 F. Supp. 2d 262, 267 (S.D.N.Y. 2006); *see also Smith v. T-Mobile USA Inc.*, 570 F.3d 1119, 1123 (9th Cir. 2009) (dismissing case because plaintiffs' "acceptance of T-Mobile's offer of judgment when no other plaintiffs had opted in disposed of the only claims they could assert at that time").[7]

III. PLAINTIFF'S FAILURE TO MOVE FOR CONDITIONAL CERTIFICATION WITHIN NINETY (90) DAYS RENDERS THE RELATION BACK DOCTRINE INAPPLICABLE.

Even if this Court follows *Sandoz* (which it should not), the "relation back" doctrine announced does not save a plaintiff's moot putative collective action from dismissal in every instance. Indeed, the *Sandoz* court stated that "relation back is warranted only when the plaintiff files for certification 'without undue delay'"[8] *Sandoz*, 553 F.3d at 921 *(quoting Weiss*, 385 F.3d at 348). In the instant case, five months have passed since Ms. Symczyk filed her complaint and she has yet to file a motion for conditional certification. Based on the Court's scheduling order, she does not intend to do so for at least another three months. Local Rule

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[7] Although Ms. Symczyk claims *Cameron-Grant* does not squarely address the issue at bar (presumably because it belies her argument) *(see* Plf's Opp. at fn. 3), *Sandoz* identifies *Cameron-Grant* as the only other Circuit Court decision that "has addressed the same type of scenario currently before us." *Sandoz*, 553 F.3d at 917.

[8] Notably, the Fifth Circuit reversed and remanded to consider whether *plaintiff* timely sought certification of her collective action. If the district court concluded no, dismissal for lack of subject matter jurisdiction remained warranted. *Sandoz*, 553 F.3d at 921-922.

23.1(c), however, mandates that parties seeking class certification file such motions within ninety (90) days of filing a class action complaint. Although Local Rule 23 does not apply to "certification" motions under the FLSA, to the extent the Court considers applying Rule 23's relation back doctrine in this case, it is certainly *prima facie* evidence of Ms. Symczyk's undue delay in seeking collective certification.[9]

II. CONCLUSION

Defendants' Rule 68 Offer of Judgment affording Ms. Symczyk all relief she could potentially receive if ultimately successful mooted her FLSA claim. Not only is there no additional relief that Ms. Symczyk can recover, there is also no representative role Ms. Symczyk can pursue with respect to her FLSA claim. As a result, this Court should honor Congress's intent as stated in the Portal-to-Portal Act and dismiss the FLSA claim.

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[9] Ms. Symczyk half-heartedly argues that resolution of Defendants' Motion is premature because the Court has yet to review the Offer and determine that it is -fair and reasonable." Plf's Opp. at 16-17. This argument is misguided. The Offer is not a waiver of, or attempt to abridge, her FLSA rights; it is a judgment in Ms. Symczyk's favor, the sufficiency of which she does not contest. If she does not contest its reasonableness, why should or would the Court? Regardless, as she herself acknowledges, "'the Third Circuit has indicated that [wage] disputes may be settled privately, without court approval.'" *See Burke v. Wackenhut Corp.*, 2007 WL 694302, *2 (M.D. Pa. Mar. 5, 2007) *(citing Coventry v. United States Steel Corp.*, 856 F.2d 514, 521 n.8 (3d Cir. 1988).

Respectfully submitted,

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Date: April 30, 2010

CERTIFICATE OF SERVICE

I hereby certify that, on April 30, 2010, a true and correct copy of the foregoing **Defendants' Motion to Dismiss for Lack of Subject-Matter Jurisdiction and Supporting Memorandum** was filed and served *via CM/ECF* electronic filing, addressed to the following party:

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed: 05/14/10]

Case No. 2:09-cv-05782-MMB

LAURA SYMCZYK,
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION and ELDERCARE RESOURCES CORPORATION,
Defendants.

Honorable Michael M. Bayison
(Filed via Electronic Case Filing System)

DEFENDANTS' ANSWER AND STATEMENT OF AFFIRMATIVE AND ADDITIONAL DEFENSES TO PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendant Genesis HealthCare Corporation and Defendant ElderCare Resources Corporation (collectively "Defendants"), by and through their undersigned counsel, hereby file this Answer and Statement of Affirmative and Additional Defenses to Plaintiff's First Amended Complaint ("Amended Complaint"). Defendants respond to the correspondingly numbered paragraphs of the Amended Complaint as follows:

1. Admitted in part; denied in part. Defendants admit that Plaintiff purports to proceed as set forth in Paragraph 1. Defendants deny, however, that this

case is properly asserted as a collective action pursuant to 29 U.S.C. § 216(b) as defined by Plaintiff in this paragraph or otherwise, that Plaintiff has a valid cause of action in any respect, that Plaintiff's claims are similar to claims of the alleged putative plaintiffs, or that Plaintiff is otherwise entitled to any relief. To the contrary, Defendants have fully and properly compensated Plaintiff for all hours worked. Finally, Defendants deny that the class of alleged similarly situated plaintiffs is properly defined.

2. Admitted in part; denied in part. Defendants admit that Plaintiff purports to proceed as set forth in Paragraph 2. Defendants deny, however, that this case is properly asserted as a state-wide class action. Defendants further deny that Plaintiff has a valid cause of action in any respect, including under the Pennsylvania Minimum Wage Act ("PMWA"), as amended, 43 Pa. C.S.C. § 333.101-333.115, the Pennsylvania Wage Payment and Collection Law ("PWPCL"), 43 Pa. C.S.A. § 260.1 *et seq.*, or Pennsylvania common law, or that Plaintiff is otherwise entitled to any relief.

3. Admitted in part; denied in part. Defendants admit that Plaintiff purports to proceed as set forth in Paragraph 3. Defendants deny, however, that this case is properly asserted as a state-wide class action pursuant to Fed. R. Civ. P. 23(a) and (b) as defined by Plaintiff in Paragraph 3 or otherwise, that Plaintiff has a valid cause of action in any respect, that Plaintiff's claims are similar to claims of the alleged putative plaintiffs, or that Plaintiff is otherwise entitled to any relief. Defendants further deny that the class of alleged similarly situated plaintiffs is properly defined.

4. Admitted in part; denied in part. Defendants admit that Plaintiff purports to use the definitions set forth in Paragraph 4 throughout the Amended Complaint. Defendants deny, however, that the definition is proper, as this case is not properly asserted as a collective or class action, Plaintiff does not have a valid cause of action in any respect, Plaintiff's claims are not similar to claims of the alleged putative plaintiffs, and Plaintiff is not otherwise entitled to any relief. Defendants further deny that the class of alleged similarly situated plaintiffs is properly defined.

5. Denied.

6. Denied. Because neither named Defendant is Plaintiff's employer under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (the "FLSA"), this Court lacks subject matter jurisdiction over Plaintiff's claim according to the express terms of Section 216(b) of the FLSA.

7. The allegations contained in Paragraph 7 of Plaintiff's Amended Complaint set forth conclusions of law to which no responsive pleading is required.

8. The allegations contained in Paragraph 8 of Plaintiff's Amended Complaint set forth conclusions of law to which no responsive pleading is required.

9. Denied as stated. Defendants admit that the allegations contained in Plaintiff's Amended Complaint occurred in this District and that venue is therefore proper in this Court.

10. Admitted in part; denied in part. Defendants admit that Plaintiff is an adult and that from April 2007 to December 2007, she worked as a Registered Nurse at Pennypack Center, Defendants lack

knowledge or information sufficient to form a belief as to the truth of the allegation concerning where Plaintiff currently resides, and therefore denies that allegation. Defendants also deny any and all remaining allegations contained in Paragraph 10 of Plaintiff's Amended Complaint.

11. Admitted in part; denied in part. Defendants admit that Plaintiff purports to proceed as set forth in Paragraph 11. Defendants deny, however, that such allegation is sufficient to comply with the requirements of Section 216(b) of the FLSA.

12. Denied as stated. Genesis HealthCare Corporation admits that, through various subsidiaries and affiliates, it offers a variety of healthcare services in more than 200 centers across 13 eastern states. Genesis HealthCare Corporation further states that it maintains its headquarters at 101 E. State Street, Kennett Square, Pennsylvania.

13. Denied.

14. Denied.

15. Denied.

16. Denied.

17. Denied.

18. Admitted in part; denied in part. Defendants admit that Plaintiff refers to Genesis HealthCare Corporation and Eldercare Resources Corporation jointly as Defendants in the Amended Complaint but Defendants deny that they are in fact proper Defendants in this action as they did not employ Plaintiff.

19. Denied.

20. Admitted in part; denied in part. Defendants admit that Plaintiff purports to proceed as set forth in Paragraph 20. Defendants deny, however, that this case is properly asserted as a collective action, that Plaintiff has a valid cause of action in any respect, that Plaintiff's claims are similar to claims of the alleged putative plaintiffs, or that Plaintiff is otherwise entitled to any relief. Defendants further deny that the class of putative plaintiffs is properly defined.

21. Denied.

22. Denied.

23. Denied.

24. Denied.

25. Denied.

26. Denied.

27. Denied.

28. Denied.

29. Denied.

30. Denied.

31. Denied.

32. Denied.

33. Denied.

34. Denied.

35. Denied.

36. Denied.

37. Denied.

38. Denied.

39. Denied.

40. Admitted in part; denied in part. Defendants admit that the first sentence of Paragraph 40 reflects Plaintiff's belief. Defendants deny, however, that Plaintiff and/or any members of the putative collective or class groups are entitled to any amounts. The second sentence in Paragraph 40 sets forth conclusions of law to which no responsive pleading is required and Defendants therefore deny those allegations.

41. Paragraph 41 of Plaintiff's Amended Complaint is an incorporation paragraph. As a result, Defendants incorporate their prior responses to all preceding paragraphs by reference.

42. Admitted in part; denied in part. Defendants admit that Plaintiff purports to proceed as set forth in Paragraph 42. Defendants deny, however, that this case is properly asserted as a collective action pursuant to 29 U.S.C. § 216(b) or as a state-wide class action. Defendants further deny that Plaintiff has a valid cause of action in any respect, including under the FLSA, the PMWA, the PWPCL, or Pennsylvania common law, or that Plaintiff is otherwise entitled to any relief.

43. Admitted in part; denied in part. Defendants admit that Plaintiff purports to proceed as set forth in Paragraph 43. Defendants deny, however, that this case is properly asserted as a collective action pursuant to 29 U.S.C. § 216(b) as defined by Plaintiff in this paragraph or otherwise, that Plaintiff has a valid cause of action in any respect, that Plaintiff's claims are similar to claims of the alleged putative plaintiffs, or that Plaintiff is otherwise entitled to any relief. To the contrary, Defendants have fully and

properly compensated Plaintiff for all hours worked. Finally, Defendants deny that the class of alleged similarly situated plaintiffs is properly defined.

44. Admitted in part; denied in part. Defendants admit that Plaintiff purports to proceed as set forth in Paragraph 44. Defendants deny, however, that this case is properly asserted as a state-wide class action pursuant to Fed. R. Civ. P. 23 as defined by Plaintiff in Paragraph 44 or otherwise, that Plaintiff has a valid cause of action in any respect, that Plaintiff's claims are similar to claims of the alleged putative plaintiffs, or that Plaintiff is otherwise entitled to any relief. Defendants further deny that the class of alleged similarly situated plaintiffs is properly defined.

45. The allegations contained in Paragraph 45 of Plaintiff's Amended Complaint set forth conclusions of law to which no responsive pleading is required.

46. Denied.

47. Denied.

a. Denied.

b. Denied.

c. Denied.

d. Denied.

e. Denied.

f. Denied.

g. Denied.

h. Denied.

i. Denied.

48. Denied.

49. Denied.

50. Denied.

51. Denied.

52. Denied.

53. Denied.

54. Denied.

55. Denied.

56. Denied.

57. Denied.

58. Denied.

59. Denied.

60. Denied.

61. Paragraph 61 of Plaintiff's Amended Complaint is an incorporation paragraph. As a result, Defendants incorporate their prior responses to all preceding paragraphs by reference.

62. Denied.

63. Denied.

64. Denied.

65. Denied. By way of further response, neither named Defendant was Plaintiff's "employer" as the term is defined in the FLSA.

66. Denied.

67. Denied.

WHEREFORE, Defendants request judgment against Plaintiff:

Dismissing Plaintiff's Amended Complaint on the merits and with prejudice;

Awarding Defendants their attorneys' fees, costs, and disbursements; and

Awarding such other relief as the Court deems just and equitable.

68. Paragraph 68 of Plaintiff's Amended Complaint is an incorporation paragraph. As a result, Defendants incorporate their prior responses to all preceding paragraphs by reference.

69. The allegations contained in Paragraph 69 of Plaintiff's Amended Complaint set forth conclusions of law to which no responsive pleading is required.

70. Denied.

71. Denied. By way of further response, neither named Defendant was Plaintiff's "employer" as the term is defined in the PMWA.

72. Denied.

73. Denied.

74. Denied.

WHEREFORE, Defendants request judgment against Plaintiff:

Dismissing Plaintiff's Amended Complaint on the merits and with prejudice;

Awarding Defendants their attorneys' fees, costs, and disbursements; and

Awarding such other relief as the Court deems just and equitable.

75. The allegations contained in Paragraph 75 of Plaintiff's Amended Complaint set forth conclusions of law to which no responsive pleading is required.

76. The allegations contained in Paragraph 76 of Plaintiff's Amended Complaint set forth conclusions of law to which no responsive pleading is required.

77. Denied. By way of further response, neither named Defendant was Plaintiff's "employer" as the term is defined in the PWPCL.

78. Denied.

79. Denied.

80. Denied.

81. Denied.

WHEREFORE, Defendants request judgment against Plaintiff:

> Dismissing Plaintiff's Amended Complaint on the merits and with prejudice;
>
> Awarding Defendants their attorneys' fees, costs, and disbursements; and
>
> Awarding such other relief as the Court deems just and equitable.

82. The allegations contained in Paragraph 82 of Plaintiff's Amended Complaint set forth conclusions of law to which no responsive pleading is required.

83. Admitted in part; denied in part. Defendants admit that Plaintiff purports to proceed as set forth in Paragraph 83. Defendants deny, however, that Plaintiff has a valid cause of action in any respect, that Plaintiff's claims are similar to claims of the alleged putative plaintiffs, or that Plaintiff is otherwise entitled to any relief.

84. Denied.

85. Denied.

86. Denied.

WHEREFORE, Defendants request judgment against Plaintiff:

Dismissing Plaintiff's Amended Complaint on the merits and with prejudice;

Awarding Defendants their attorneys' fees, costs, and disbursements; and

Awarding such other relief as the Court deems just and equitable.

AFFIRMATIVE AND ADDITIONAL DEFENSES

1. To the extent the Court finds that Defendants took any actions or omissions with respect to Plaintiff, such acts or omissions concerning or affecting Plaintiff and the putative classes Plaintiff purports to represent were undertaken in good faith to comply with the FLSA and the PMWA and with reasonable grounds that the actions did not violate the FLSA or the PMWA, and were justified, proper, and lawful, and were taken without any intent to violate the FLSA or the PMWA.

2. To the extent Plaintiff's and/or putative class members' claims implicate the National Labor Relations Act and/or the Labor Management Relations Act, the doctrine of preemption bars Plaintiff's purported claims and the claims she seeks to assert on behalf of others.

3. To the extent Plaintiff seeks to enforce putative class members' rights under collective bargaining agreements to which she is not a party, Plaintiff lacks standing to pursue the purported claims in

whole or in part. This defense may also apply to the purported claims of some or all of the potential members of the putative classes that Plaintiff purports to represent.

4. Plaintiff's purported claims and the claims she seeks to assert on behalf of others are barred in whole or in part by the doctrines of laches, waiver, release, accord and satisfaction, and/or unclean hands.

5. Plaintiff's purported claims are barred in whole or in part by Plaintiff's failure to mitigate her alleged damages and/or to the extent she failed to exercise reasonable diligence to avoid harm, insofar as Plaintiff failed to utilize internal complaint procedures available to her regarding the matters alleged in the Amended Complaint. This defense may also apply to the purported claims of some or all of the potential members of the putative class that Plaintiff purports to represent.

6. To the extent that discovery reveals that Plaintiff falsely reported her hours and there is no evidence that Defendants required the false reporting of hours; and no evidence that Defendants knew or should have known that Plaintiff was providing false information as to her hours, or to the extent discovery reveals that Plaintiff otherwise failed to follow Defendants' policies for reporting her hours, the doctrine of estoppel bars the claims asserted by Plaintiff. This defense may also apply to the purported claims of some or all of the potential members of the putative class that Plaintiff purports to represent.

7. Plaintiff's purported claims and the claims she seeks to assert on behalf of others are barred in whole or in part by Section 10 of the Portal-to-Portal Act, 29 U.S.C. § 259, because any acts or omissions

giving rise to this action were done in good faith and in reliance on written administrative regulations, orders, rulings, interpretations and approvals of the Department of Labor.

8. Plaintiff's purported claims and the claims she seeks to assert on behalf of others are barred in whole or in part by Section 11 of the Portal-to-Portal Act, 29 U.S.C. § 260, because any acts or omissions giving rise to this action were done in good faith and with reasonable grounds for believing that the actions or omissions were not a violation of the FLSA or any other state or federal law.

9. To the extent that the period of time alluded to in the Amended Complaint, or the period of time alleged later in this action, predates the limitations period set forth in Section 6(a) of the Portal-to-Portal Act, 29 U.S.C. § 255(a), such claims are barred.

10. Plaintiff does not, and cannot, fairly and adequately represent the interests of the purported classes.

11. Certification of a collective action, as applied to the facts and circumstances of this case, would constitute a denial of Defendants' procedural rights and right to trial by jury, and to substantive and procedural due process, in violation of the Fourteenth Amendment of the United States Constitution.

12. Plaintiff's Rule 23 class claims are incompatible with her Rule 216(b) collective action claims. Accordingly, this Court should dismiss Plaintiff's Rule 23 class allegations with prejudice and allow Plaintiff to assert her wage and hour claim under Pennsylvania state law on an individual basis in this action.

13. Plaintiff is not entitled to equitable relief insofar as she has an adequate remedy at law.

14. Plaintiff's claims are barred to the extent Plaintiff and/or alleged similarly situated employees did not work more than forty (40) hours in any given work week and, therefore, are not entitled to overtime under § 207 of the FLSA.

15. Plaintiff and all alleged putative class members have been paid and/or received all wages and/or compensation due to them by virtue of their alleged employment.

16. This Court lacks subject matter jurisdiction over Plaintiff's claim to the extent that Defendants are not Plaintiff's "employer" as defined under the FLSA and the PMWA.

17. Plaintiff and the members of the putative collective action are not similarly-situated.

18. This suit may not be properly maintained as a class action because: (1) Plaintiff failed to plead, and cannot establish, the necessary procedural elements for class treatment; (2) a class action is not an appropriate method for the fair and efficient adjudication of the claims described in the Amended Complaint; (3) common issues of fact or law do not predominate and, to the contrary, individual issues predominate; (4) Plaintiff's claims are not representative or typical of the claims of the putative class; (5) Plaintiff is not a proper class representative; (6) Plaintiff and her counsel of record are not adequate representatives for the alleged putative class; (7) Plaintiff cannot satisfy any of the requirements for class action treatment, and class action treatment is neither appropriate nor constitutional; (8) there is not a well-defined community of interest in the questions of law or fact affect-

ing Plaintiff and the members of the alleged putative class; (9) the alleged putative class is not ascertainable, nor are its members identifiable; and (10) to the extent that the alleged putative class is ascertainable and its members are identifiable, the number of putative class members is too small to meet the numerosity requirement for a class action.

19. Defendants oppose class certification and dispute the propriety of class treatment. If the Court certifies a class in this case over Defendants' objections, then Defendants asserts the affirmative and other defenses set forth herein against each and every member of the certified class.

20. Plaintiff's claims are barred because Defendants fully performed and/or met its obligations, if any, to Plaintiff.

21. Plaintiff's Amended Complaint fails to state any facts that would entitle Plaintiff to recover any compensatory damages, liquidated damages, punitive damages, attorneys' fees, costs or equitable relief from Defendants.

22. Plaintiff's claims are barred to the extent Defendants are not Plaintiff's "employer" within the meaning of the FLSA and applicable state statutes.

23. At all times, Defendants acted toward Plaintiff in good faith and did not willfully violate any law or deprive Plaintiff of any right or benefit.

24. Plaintiff's alleged injuries were not proximately caused by any unlawful policy, custom, practice and/or procedure promulgated and/or tolerated by Defendants.

25. To the extent that Plaintiff's claims implicate the National Labor Relations Act and/or Labor Man-

agement Relations Act, the doctrine of preemption bars the purported claims of Plaintiff and those she seeks to represent.

26. Plaintiff's state statutory and common law claims are preempted by the FLSA and/or the availability of other exclusive state statutory remedies.

27. The absence of a written contract between Plaintiff and Defendants precludes her claim under the PWPCL.

28. To the extent any members of the putative collective action and/or classes have signed a release and/or waiver encompassing the claims alleged in Plaintiff's Amended Complaint, their claims are barred by that release and/or waiver.

Defendants reserve the right to assert any additional defenses they discover during the course of litigation.

WHEREFORE, Defendant Genesis HealthCare Corporation and Defendant ElderCare Resources Corporation request that this Court dismiss Plaintiff's Amended Complaint with prejudice; that it enter judgment in Defendants' favor and against Plaintiff on all counts; and that this Court award Defendants their costs and attorneys' fees incurred in defending this action and such other relief as it deems appropriate.

Respectfully submitted,

/s/ James N. Boudreau
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Attorneys for Defendants
Genesis Healthcare Corporation and
Eldercare Resources Corporation

Date: May 14, 2010

CERTIFICATE OF SERVICE

I hereby certify that, on May 14, 2010, a true and correct copy of the foregoing **Defendants' Answer and Statement of Affirmative and Other Defenses to Plaintiff's Amended Complaint** was filed and served *via CM/ECF* electronic filing, addressed to the following party:

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/s/ James N Boudreau

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed: 05/27/10]

Case No.: 2:09-cv-05782-MMB

LAURA SYMCZYK, an individual, on behalf of herself and others similarly situated,:
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION and ELDERCARE RESOURCES CORPORATION,
Defendants.

Honorable Michael M. Bayison

Notice of Consent Filing

PLEASE TAKE NOTICE, that pursuant to 29 U.S.C. § 216, Plaintiff hereby files the attached Consent to Sue form for the following individual in the above-captioned action:

Symczyk, Laura

Dated: May 27, 2010

By: /s/ Gary F. Lynch•
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Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2010, I caused a true and correct copy of the foregoing Notice of Consent Filing to be electronically filed with the Clerk of the Court. The Notice is available for viewing and downloading and will be served by operation of the Court's electronic filing system (CM/ECF) upon all counsel of record.

Dated: May 27, 2010

By: /s/ Gary F. Lynch
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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed: 05/27/10]

Case No.: 2:09-cv-05782-MMB

LAURA SYMCZYK, an individual, on behalf of herself and others similarly situated,:
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION and ELDERCARE RESOURCES CORPORATION,
Defendants.

Honorable Michael M. Bayison

CONSENT TO BECOME A PARTY PLAINTIFF

1. As I expressly indicated in paragraph 13 of my complaint, I, Laura Symczyk, consent to sue as a Plaintiff in this action, pursuant to the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq*.

2. By my signature below, I hereby authorize counsel to prosecute the claims in my name and on my behalf, in this action, for Defendant's failure to pay overtime wages as required under federal law.

DATE: 5/19/10

BY: Laura Symczyk
Print Name

BY: Laura Symczyk
Signature

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed: 06/03/10]

Case No.: 2:09-cv-05782-MMB

LAURA SYMCZYK, an individual, on behalf of herself and others similarly situated,:
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION and ELDERCARE RESOURCES CORPORATION,
Defendants.

Honorable Michael M. Bayison

STATEMENT OF PLAINTIFF'S COUNSEL REGARDING JURISDICTION

On, May 19, 2010, this Court issued a Memorandum and Order, wherein Plaintiff was ordered to file a brief regarding this Court's continuing jurisdiction over Plaintiff's state law claims in the event this Court grants defendant's currently pending motion to dismiss plaintiff's FLSA claim.

After consulting with defense counsel, and in reliance upon specific demographic data supplied by defendant, plaintiff hereby notifies the Court that she believes her state law claims properly fall within the "Home State Exception" to jurisdiction under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. 1332(d)(4). Accordingly, Plaintiff believes diversity jurisdiction pursuant to CAFA does not exist in this case.

Dated: June 3, 2010

Respectfully submitted,

By: /s/ Gary F. Lynch
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CASE NO. 10-3178

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LAURA SYMCZYK, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED
Plaintiff, Appellant,

v.

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORPORATION
Defendants, Appellees.

Appeal from the United States District Court
For the Eastern District of Pennsylvania
in Civil Action No. 09-5782
Michael M. Baylson,
United States District Judge

BRIEF FOR APPELLANT

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ORAL ARGUMENT REQUESTED

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 216. On June 24, 2010, the district court entered an Order dismissing Plaintiff's FLSA claim and directing the Clerk to close the case. Plaintiff/Appellant filed a timely notice of appeal. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Should the Third Circuit Court of Appeals' decision in *Weiss v. Regal Collection*, 385 F.3d 337 (3d Cir. 2004), which held that, in the Rule 23 context, a representative plaintiffs claims were not mooted by an offer of judgment, be extended to other representative actions, including collective actions brought pursuant to Section 216(b) of the FLSA?

2. In a collective action brought pursuant to Section 216(b) of the FLSA, does Defendants' Fed. R. Civ. P. 68 offer of judgment, extended to Plaintiff on her individual claim, render Plaintiff's claim moot where Plaintiff has not had an opportunity to conduct discovery and has not yet filed a motion for conditional certification pursuant to Section 216(b) of the FLSA?

3. Even if Plaintiff's individual claim has been mooted by an offer of judgment, does Plaintiff continue to have standing to pursue the FLSA claims on behalf of the prospective collective action class?

STATEMENT OF THE CASE

On December 4, 2009, Plaintiff/Appellant Laura Symczyk (hereinafter "Symczyk" or "Appellant") filed her Collective Action Complaint alleging that Genesis Healthcare Corporation and Eldercare Resources Corporation (hereinafter "Appellees") violated the Fair Labor Standards Act of 1938, 29 U.S.C. §201 *et seq*. ("FLSA").

On February 18, 2010, Appellees filed an Answer to Symczyk's Complaint. On that same day, Appellees served a Fed.R.Civ.P. 68 Offer of Judgment on Symczyk. Symczyk did not respond to that offer.

On March 8, 2010, the district court held a Fed.R.Civ.P. 16 Pretrial Telephone Conference with the parties' counsel. Following that conference, on March 10, 2010, the district court entered a scheduling order. Pursuant to that order, the parties were to have an initial ninety (90) day discovery period, at the close of which Symczyk was to move for conditional certification under Section 216(b) of the FLSA.

Thereafter, Appellees filed a motion to dismiss for lack of subject matter jurisdiction on March 23, 2010, claiming that Symczyk's claim was mooted by her failure to accept the offer of judgment.

The district court granted Appellees' motion to dismiss. This appeal was timely filed, seeking reversal of the district court's Order granting Appellees' Motion to Dismiss.

STATEMENT OF THE FACTS

On December 4, 2009, Symczyk filed a collective action alleging that Appellees violated the FLSA by implementing an automatic meal break deduction policy, pursuant to which thirty minutes is automatically deducted from each employees' work time every shift, regardless of whether such employee actually receives an uninterrupted meal break. (J.A. 18, Collective Action Complaint). On February 18, 2010, Appellees filed an Answer to the Collective Action Complaint. (J.A. 28, Answer). On that same day, Appellees served a Fed.R.Civ.P. 68 Offer of Judgment on Symczyk. Symczyk did not respond to Appellees' Offer of Judgment.

On March 8, 2010, the district court held a Fed.R.Civ.P. 16 Pretrial Telephone Conference with counsel for the parties. Following that conference, on March 10, 2010, the district court entered a scheduling order. (J.A. 38, Scheduling Order). Pursuant to that order, the Parties were to have an initial ninety (90) day discovery period, at the close of which Symczyk was to move for conditional certification under Section 216(b) of the FLSA. *Id.* Following the district court's ruling on Symczyk's certification motion, the parties were to have an additional six (6) month discovery period, which was to begin at the close of any court-ordered opt-in window. *Id*

On March 23, 2010, Appellees filed a motion to dismiss Symczyk's complaint based on a lack of jurisdiction. (J.A, 39, Motion to Dismiss for Lack of Subject Matter Jurisdiction), Appellees argued that Symczyk's claim was mooted by her failure to accept the offer of judgment which provided for compensation that was "equal to or greater than the potential relief she could obtain at trial." *Id.*

On March 29, 2010, Appellees removed, to federal court, a related state court complaint which Symczyk filed in the Philadelphia County Court of Common Pleas alleging violations of Pennsylvania state law and based upon the same factual allegations regarding Appellees' pay practices. On April 13, 2010, the parties filed a Proposed Stipulated Order pursuant to which Symczyk would voluntarily dismiss her related state-law action and would thereafter file an amended complaint in this action to include those state law claims that were asserted in the related state-law action. (J.A. 60, Proposed Stipulated Order). On April 15, 2010, the district court entered the parties' stipulated order. (LA. 62, Stipulation and Order). Subsequently, on April 23, 2010, Symczyk filed an Amended Class/Collective Action Complaint. (LA. 83, First Amended Class/Collective Action Complaint).

Symczyk filed her Brief in Opposition to the Motion to Dismiss for Lack of Jurisdiction on April 16, 2010. (J.A. 64, Brief in Opposition to Motion to Dismiss). On April 30, 2010, Appellees filed a Reply to Symczyk's Brief in Opposition to the Motion to Dismiss. (J.A. 99, Reply to Response to Motion to Dismiss). On May 19, 2010, the district court entered a Memorandum re: Motion to Dismiss for Lack of Subject Matter Jurisdiction. (J.A. 3, Memorandum re: Motion to Dismiss for Lack of Subject Matter Jurisdiction). In that memorandum, the district court indicated:

> The Court has tentatively concluded that Defendants' Rule 68 offer of judgment moots this collective action, and thus, that this collective action should be dismissed for lack of subject matter jurisdiction. In that event, the Court would likely decline, in its discretion, to exercise

> supplemental jurisdiction over Symczyk's claims under Pennsylvania law, which can be re-filed in state court. Although Symczyk will be given an opportunity to justify continued federal jurisdiction under Rule 23, the Court expresses doubt as to whether Symczyk can make such a showing, because the Rule 23 allegations in the case are limited to the state law claims, and Rule 23 does not itself confer jurisdiction.

Id. Concurrently, with its May 19, 2010 Memorandum, the district court entered an order directing Symczyk to file a brief in support of continued federal jurisdiction and a motion for class certification pursuant to Fed.R.Civ.P. 23 by June 10, 2010. (J.A. 13, May 19, 2010 Order).

On June 3, 2010, Symczyk filed a Statement of Plaintiff's Counsel Regarding Jurisdiction. (J.A. 133, Statement Regarding Jurisdiction). In that statement, Symczyk indicated that she did not believe the district court had an independent basis for continued federal jurisdiction over her state-law claims in the event that her FLSA claim was dismissed. *Id*

On June 9, 2010, Symczyk filed a Motion to Vacate the June 10, 2010 Class Certification Motion Deadline Due to Lack of Subject Matter Jurisdiction. (J.A. 135, Motion to Vacate). On June 11, 2010, the district court entered an order granting Symczyk's motion to vacate, dismissing the complaint for lack of federal subject matter jurisdiction, and remanding the case to state court. (J.A. 14, June 11, 2010 Order). On June 24, 2010, the district court entered an order vacating the June 11, 2010 Order and dismissing Symczyk's FLSA claim with prejudice consistent with

the court's May 19, 201 Memorandum. (J.A. 16, June 24, 2010 Order).

On July 19, 2010, Symczyk filed a timely Notice of Appeal. (J.A. 1, Notice of Appeal).

STATEMENT OF RELATED CASES AND PROCEEDINGS

Plaintiff/Appellant is unaware of any previous or pending appeals before this Court arising out of the same case or proceeding. Plaintiff/Appellant is unaware of any related cases or proceedings pending before any other court or agency, state or federal.

STANDARD OF REVIEW

This Court's review of the district court's order granting a motion to dismiss for lack of subject matter jurisdiction is plenary. *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir.2000). Appellees' mootness argument relies upon facts not included in the complaint (i.e., appellees' Fed.R.Civ.P. 68 Offer of Judgment) and is therefore a factual challenge to jurisdiction. In a factual attack under Rule 12(b)(1), the court may consider and weigh evidence outside the pleadings to determine if it has jurisdiction. *See Mortensen v. First Federal Say. & Loan Ass'n.*, 549 F.2d 884, 891 (3d Cir. 1977). The plaintiff has the burden of persuasion to convince the court it has jurisdiction. *See Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir.1991).

SUMMARY OF THE ARGUMENT

The district court, in granting Appellees' motion to dismiss, concluded that Appellees' Fed.R.Civ.P. 68 Offer of Judgment tendered to Symczyk, which provided for her individual damages under the FLSA, plus reasonable attorneys' fees and costs, mooted her collective action. The district court's conclusion, however, is at odds with Third Circuit precedent.

In the context of a Fed.R.Civ.P. 23 class action, this Court has held that the "relation back" doctrine precludes a finding of mootness when a Rule 68 offer of judgment is tendered to a plaintiff prior to the filing of a class certification motion. *Weiss v. Regal Collection*, 385 F.3d 337 (3d Cir. 2004). Rather than dismiss the action as moot, this Court held that a representative plaintiff should be permitted to file a class certification motion, and that such motion would "relate back" to the filing of the complaint,

thereby eliminating any concerns that the representative plaintiff lacked standing to sue. *Id.* at 348.

The discussion by this Court in *Weiss* reveals that the. Court did not draw any meaningful distinction between a Rule 23 class action and a Section 216(b) collective action for purposes of considering and adopting the "relation back" doctrine. In fact, in the wake of *Weiss*, several courts, including the United States Court of Appeals for the Fifth Circuit, have recognized that, the "relation back" doctrine applies as much, if not more so, in an FLSA case as in a Rule 23 case because both types of actions are susceptible to strategic mooting by defendants through the use of a Rule 68 offer of judgment.

In reaching its holding, the district court all but ignored the analysis set forth by this Court in *Weiss*, and instead relied on a handful of district court cases from outside the Third Circuit that are either distinguishable on their facts or failed to engage in any meaningful analysis of the "relation back" doctrine set forth by this Court.

Thus, for the reasons set forth below, the district court's order granting Appellees' motion to dismiss should be reversed.

ARGUMENT

I. The Constitutional Doctrine Of Standing And Mootness Generally

Article In of the United States Constitution limits the jurisdiction of the federal courts to "cases and controversies." U.S. Const. art. III §2. *Intl Brotherhood of Boilermakers v. Kelly*, 815 F.2d 912, 914 (3d. Cir. 1987). However, "'a case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" *Id.* at 915 (quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969)). "That is, if developments occur during the course of adjudication that eliminate a plaintiffs personal stake in the outcome of a suit or prevent a court from being able to grant the requested relief, the case must be dismissed as moot." *Donovan ex. rel. Donovan v. Punxsutawney Area School Bd.*, 336 F.3d 211, 216 (3d Cir.2003). An offer of complete relief will generally moot the plaintiffs claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation. *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir.1991)("Once the defendant offers to satisfy the plaintiffs entire demand, there is no dispute over which to litigate and a plaintiff who refuses to acknowledge this loses outright, under Fed.R.Civ.P. 12(b)(1), because he has no remaining stake.") (internal citation omitted); *see also* 13A Charles Alan Wright & Arthur R. Miller, Fed. Practice and Procedure: Jurisdiction 2d § 3533.2, at 236 (2d ed. 1984) ("Even when one party wishes to persist to judgment, an offer to accord all of the relief demanded may moot the case.").

II. This Court Has Held That The "Relation Back" Doctrine Precludes A Finding Of Mootness In The Class Action Context

Although the this Court has not, in the context of an FLSA action, addressed the issue raised by Appellees' motion to dismiss, i.e., whether a defendant may use Rule 68 to "pick-off" a representative plaintiff, this Court has considered and rejected the use of such tactic in the context of other representative actions, in particular a Rule 23 class action. In *Weiss v. Regal Collection*, 385 F.3d 337 (3d Cir. 2004), the plaintiff filed a class action complaint alleging violations of the Fair Debt Collection Practices Act ("FDCPA") and seeking statutory damages on behalf of himself and a putative class. Before filing an answer and before the plaintiff moved to certify the class, the defendants proffered a Rule 68 offer of judgment in an amount equal to the statutory limit on damages, plus costs and reasonable attorneys' fees. The plaintiff did not accept the offer of judgment and defendants subsequently moved to dismiss under Fed.R.Civ.P. 12(b)(1), arguing that plaintiff's claim was rendered moot because the offer of judgment provided him with the maximum damages available under the FDCPA. Applying traditional mootness principles, the district court dismissed plaintiffs complaint.

This Court reversed the district court, holding that the "relation back" doctrine precludes a finding of mootness prior to a motion for class certification. Rather than dismiss the action as moot, this Court held that the district court should have permitted the representative plaintiff to file a class certification motion, and that such motion would "relate back" to the filing of the complaint, thereby eliminating any

concerns that the representative plaintiff lacked standing to sue. *Id.* at 348. In so holding, this Court stated as follows:

> There appears to be considerable authority that once a motion for class certification has been filed, the "relation back" doctrine explained by the Supreme Court in *Sosna v. Iowa*, 419 U.S. 393, 399, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975) comes into play. In *Sosna*, the Court recognized:
>
> > There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.
>
> *Id.* at 402 n. 11, 95 S.Ct. 553. Furthermore, in *Geraghty* the Court held class certification may relate back to the filing of the complaint where claims are "so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." 445 U.S. at 399, 100 S.Ct. 1202 (1980). The mootness exception recognizes that, in certain circumstances, to give effect to the purposes of Rule 23, it is necessary to conceive of the named plaintiff as a part of an indivisible class and not merely a single adverse party even before the class certification question has been decided. By relating class certification back to the filing of a class complaint, the class representative would retain

standing to litigate class certification though his individual claim is moot. But the question in this case is whether the "relation back" doctrine should apply only after the filing of a motion for class certification or whether it may also be employed after the filing of a class complaint.

The "relation back" doctrine generally has been used for "inherently transitory" claims. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 52, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991) (quoting *Geraghty*, 445 U.S. at 399, 100 S.Ct. 1202). Although Weiss's claims here are not "inherently transitory" as a result of being time sensitive, they are "acutely susceptible to mootness," *Comer v. Cisneros*, 37 F.3d 775, 797 (2d Cir.1994), in light of defendants' tactic of "picking off" lead plaintiffs with a Rule 68 offer to avoid a class action. As noted, this tactic may deprive a representative plaintiff the opportunity to timely bring a class certification motion, and also may deny the court a reasonable opportunity to rule on the motion.

It bears noting that most of the cases applying the relation back doctrine have done so after a motion to certify the class has been filed. *See Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1048-49 (5th Cir. July 1981); *Susman v. Lincoln Am. Corp.*, 587 F.2d 866, 869-71 (7th Cir. 1978). Nonetheless, reference to the bright line event of the filing of the class certification motion may not always be well-founded. Representative actions vary according to the substantive claims and the courses of action. There are at least three distinct events on the path to a certified class: filing the class complaint, filing the motion

> for class certification, and a decision on the motion. Yet plaintiffs may file the class certification motion with the class complaint, and in some cases, include a motion for approval of an already negotiated settlement. Of course, the federal rules do not require certification motions to be filed with the class complaint, nor do they require or encourage premature certification determinations. It seems appropriate, therefore, that the class action process should be able to "play out" according to the directives of Rule 23 and should permit due deliberation by the parties and the court on the class certification issues.
>
> That said, the proper procedure is for the named representative to file a motion for class certification. That did not occur here. But neither was there undue delay. In circumstances like these, we believe the relation back doctrine should apply. Absent undue delay in filing a motion for class certification, therefore, where a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint. Because in this case, no motion for class certification was made, we will direct the trial court to allow Weiss to file the appropriate motion.

Id. at 346-48 (footnotes omitted).

III. The Differences Between Section 216(b) And Rule 23 Do Not Preclude The Application Of The "Relation Back" Doctrine In The FLSA Context

While there are certainly differences between Section 216(b) and Rule 23, the most significant being that Section 216(b) contemplates an "opt-in" class and Rule 23 typically provides for an "opt-out" class, these differences were not relevant to this Court's analysis and holding regarding the use of the "relation back" doctrine in response to a Rule 68 mootness argument in *Weiss*. Indeed, several courts, analyzing this precise question in the wake of the *Weiss*, have recognized that, for purposes of the "relation back" doctrine, there is no difference between Rule 23 and Section 216(b). In *Sandoz v. Cingular Wireless, LLC*, 553 F.3d 913 (5th Cir. 2008), the United States Court of Appeals for the Fifth Circuit held that the "relation back" doctrine applies as much in an FLSA case as in a Rule 23 case because both types of actions are susceptible to strategic mooting by defendants through the use of a Rule 68 offer of judgment. After a thorough discussion of *Weiss*, the Fifth Circuit concluded:

> [T]he differences between class actions and FLSA § 216(b) collective actions do not compel a different result regarding whether a certification motion can "relate back" to the filing of the complaint. The status of a case as being an "opt in" or "opt out" class action has no bearing on whether a defendant can unilaterally moot a plaintiffs case through a Rule 68 offer of judgment. Although the differences between Rule 23 class actions and FLSA § 216(b) collective actions alter the conceptual mootness inquiry, each type

> of action would be rendered a nullity if defendants could simply moot the claims as soon as the representative plaintiff files suit. Thus, the policies behind applying the "relation back" principle for Rule 23 class actions apply with equal force to FLSA § 216(b) collective actions. *Cf. Rubery v. Buth-Na-Bodhaige, Inc.*, 494 F.Supp.2d 178, 181 (W.D.N.Y.2007) (holding that the defendant's motion to dismiss based on its Rule 68 offer of judgment was premature because the court had not yet ruled on the plaintiffs motion for certification of the action as a class action or collective action). This principle also comports with the balance the FLSA attempts to strike. *See De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 306 (3d Cir.2003) (noting that Congress enacted the opt-in provision for FLSA collective actions in an attempt to "strike a balance to maintain employees' rights but curb the number of lawsuits").

Id. at 920. *See also, Nash v. CVS Caremark Corp., et al.*,—F.Supp.2d—, 2010 WL 446178 (D.R.I. Feb. 9, 2010)(application of the "relation back" doctrine in a collective action under the FLSA precluded a finding of mootness); *Yeboah v. Central Parking System*, 2007 WL 3232509, *3 (E.D.N.Y. Nov. 1, 2007)(recognizing that the concerns that arise when Rule 68 is applied in the Rule 23 class action context are also present when Rule 68 is applied in the FLSA collective action context); *Rubery v. Buth-Na-Bodhaige, Inc.*, 494 F.Supp.2d 178, 180-81 (W.D.N.Y. 2007) (same).

Contrary to the district court's holding, the differences between Rule 23 class actions and Section 216(b) collective actions actually weigh in favor of rejecting a finding of mootness. As recently explained by the United States District Court for the District of

Rhode Island, the procedural differences between Rule 23 class actions and Section 216(b) collective actions make the application of the "relation back" doctrine even more appropriate in a collective action:

> FLSA actions are more vulnerable to manipulation than Rule 23 actions. For the latter, filing a complaint tolls the statute of limitations for all the alleged class members, whether they know of the lawsuit or not. In contrast, parties alleged to be "similarly situated" in a § 216(b) case must affirmatively opt in to toll the limitations period.
>
> This means that defendants can bleed value out of a large pool of outstanding FLSA claims in a way they cannot with a comparable group of Rule 23 claims. "Picking off" § 216 (b) plaintiffs delays the point at which any collective action can be provisionally certified. This stalls notification to potential "similarly situated" parties. The longer it takes for an FLSA action to mature, the lower members' damages will be once they opt in, given the two-year limitations period. In a parallel situation under Rule 23, the clock for absentees stops upon the filing of a complaint that raises their claims. Thus, even if employers pick off some named plaintiffs, the limitations period for absentees pauses while any applicable class action is pending.
>
> . . .
>
> Simply put, it is easier to drown collective actions than class actions. If allowed to use Rule 68 as a weapon, defendants can torpedo complaint after complaint, leaving opt-ins to swim for the nearest viable action as their claims leak value.

> This justifies a more relaxed mootness standard in FLSA cases than Rule 23 cases. . .

Nash, 2010 WL 446178, at ** 4-5 (citations omitted).

Furthermore, the discussion by this Court in *Weiss* reveals that the Court did not draw any meaningful distinction between Rule 23 and Section 216(b), for purposes of considering and adopting the "relation back" doctrine. Throughout its decision in *Weiss*, this Court cites and discusses its prior decision in *Lusardi v. Xerox Corp.*, 975 F.2d 964 (3d Cir.1992), a case involving an age discrimination claim brought as a class action pursuant to the procedural enforcement mechanism of Section 216(b). In *Lusardi*, the plaintiffs, upon decertification of their Section 216(b) class, voluntarily settled their individual age discrimination claims and then subsequently filed a new motion for class certification pursuant to Section 216(b). This Court, in affirming the district court's dismissal of the class claims, noted that plaintiffs, having entered into individual settlements, no longer had justiciable claims and could not therefore pursue Section 216(b) certification. Lusardi, 975 F.2d at 979-80.

In *Weiss*, this Court expressed concern that its adoption of the "relation back" doctrine "creates some tension with our opinion in *Lusardi*." *Weiss*, 385 F3d at 348. In reconciling its decision in *Weiss* with its prior decision in *Lusardi*, however, the Court did not simply rely upon the obvious fact that *Lusardi* dealt with Section 216(b). Rather, this Court reconciled its decision with *Lusardi* by noting that *Lusardi* involved a voluntary settlement rather than an offer of judgment. *Weiss*, 385 F.3d at 348 ("In this appeal, the 'picking off' scenarios described by the Supreme Court in *Roper* are directly implicated. In *Lusardi* they were not"). Symczyk respectfully suggests that

the failure of this Court to distinguish *Lusardi* on the basis that it involved Section 216(b) rather than Rule 23 is telling and directly undermines any conclusion by the district court that the procedural differences between Section 216(b) and Rule 23 are in any way relevant to the issues presented by Appellees' motion to dismiss.[1,2]

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[1] Notably, in *Brown v. Phildelphia Hous. Auth.*, 350 F.3d 338 (3d Cir. 2003), upon which Appellees relied for the proposition that once a defendant makes an offer of judgment, the "district court loses subject matter jurisdiction over the plaintiff's case," this Court again cited and relied upon *Lusardi* with no mention of the fact that *Lusardi* arose under Section 216(b). *See Weiss*, 385 F.3d at 348, n. 20. Indeed, Appellees actually cited the portion of the *Brown* decision which quotes *Lusardi*. (LA. 39, Memorandum in Support of Motion to Dismiss for Lack of Jurisdiction at pp. 3-5).

[2] While giving little credence to this Court's analysis in *Weiss*, the district court, in the Memorandum re: Motion to Dismiss for Lack of Subject Matter Jurisdiction, cited to a series of district court cases outside of the Third Circuit that held that a Rule 68 offer of judgment moots an FLSA collective action. These cases either completely ignore or overlook the "relation back" doctrine or were decided on facts distinguishable from the facts of this case. *See Vogel v. American Kiosk Mgmt.*, 371 F.Supp. 2d 122 (D.Conn. 2005)(the court failed to engage in any discussion of the "relation back" doctrine); *Briggs v. Arthur T. Mott Real Estate, LLC*, 2006 WL 3314624 (E.D.N.Y. Nov. 14, 2006)(same); *Ward v. Bank of New York*, 455 F.Supp. 2d 262 (S.D.N.Y. 2006) (same); *Mackenzie v. Kindred Hospitals East, LLC*, 276 F.Supp.2d 1211 (M.D.Fl. 2003)(same); *Thomas v. Interland, Inc.*, 2003 WL 24065651 (N.D.Ga. 2003)(defendant made an offer to compensate plaintiff for the alleged wage and overtime violations before litigation even commenced); *Darboe v. Goodwill Industries of Greater NY and Northern NJ, Inc.*, 485 F.Supp.2d 221(E.D.N.Y. 2007)(defendant tendered the offer of judgment more than a year after the complaint was filed and after the close of discovery and plaintiff never moved for conditional certification pursuant to Rule 216(b)); *Louisdor v. American Telecommuni-*

IV. Courts Routinely Have Been Reluctant To Permit Defendants To "Pick-off" Individual Plaintiffs In A Class/Collective Action

Allowing a defendant to use a Rule 68 offer of judgment to "pick-off" individual claimants before class certification can be reached effectively nullifies representative actions because a defendant can easily pay off any given member of a class for a fraction of the entire class's potential total damages. Indeed, one of the primary reasons for representative actions in the first place is because individual damages are typically small. *Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980)("Pick-offs" "obviously would frustrate the objectives of class actions" – that is, enabling plaintiffs to redress wrongs even "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages Accordingly, courts generally look unfavorably upon this inherently inequitable tactic of "picking-off" representative plaintiffs and routinely have disallowed this practice.

In *Roper*, the Supreme Court recognized the inherent evils in allowing a defendant to "short circuit" a class action by paying off individual class representatives. In holding that the individual class representatives retained an interest in appealing the district court's denial of class certification subsequent to offers of judgment to the named plaintiffs, the Court stated as follows:

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cations, Inc., 540 F.Supp.2d 368 (E.D.N.Y. 2008)(defendant made an offer of judgment more than a year after the action was initiated and no individuals had opted-in when motion was decided almost two years after the complaint was filed).

> A district court's ruling on the certification issue is often the most significant decision rendered in these class-action proceedings. To deny the right to appeal simply because the defendant has sought to "buy off" the individual private claims of the named plaintiffs would be contrary to sound judicial administration. Requiring multiple plaintiffs to bring separate action, which effectively could be "picked off" by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover, it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement.

Id. at 339.

Although a plaintiff in a Section 216(b) collective action, in contrast to a Fed. R. Civ. P. 23 plaintiff, does not retain an interest in representing any class members other than those who affirmatively "opt-in," many courts, recognizing that the rationale set forth in *Roper* applies with equal force in Section 216(b) collective actions, have concluded that a Rule 68 "pick-off" is not appropriate in the context of the FLSA. For example, in *Yeboah*, the defendant in an FLSA case, as here, served a Rule 68 Offer of Judgment and then moved to dismiss based on its assertion that the offer more than fully satisfied plaintiff's claims. In denying the defendant's motion, the court found:

> The application of Fed. R. Civ. P. 68 in the FLSA context raises pragmatic concerns, including the danger that defendants will "provid[e] an offer of judgment to the initial plaintiff in a FLSA collective action in order to bar the case from

proceeding as to all similarly situated plaintiffs," which, as one district court observed, would "violate[ ] the very policies behind the FLSA." (citation omitted). The Supreme Court has remarked on the importance of guarding against this danger in the related context of Rule 23 class actions; "Requiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions . . ." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980). *See also, Weiss v. Regal Collections*, 385 F.3d 337, 344 (3d Cir. 2004)("[A]llowing the defendant here to 'pick off' a representative plaintiff with an offer of judgment less than two months after the complaint if filed may undercut the viability of the [Rule 23] class action procedure, and frustrate the objectives of this procedural mechanism . . . .") (citation omitted).

Defendant objects to plaintiff's citation to *Roper*, *Weiss*, and other decisions in the Rule 23 context. These cases are inapposite, defendant insists, since permitting a Rule 68 offer to moot a FLSA plaintiff's claims does not risk prejudice to absent class members, as it does in the Rule 23 context, where any judgment binds all class members save those who have opted out. However, even if defendants are correct that permitting defendants to "pick off" individual FLSA plaintiffs presents no danger of prejudicing absent class members, as it would in the Rule 23 context, the *Roper* Court described at least two other dangers. First, as noted above, the Court

> declared that permitted such "pick-offs" "obviously would frustrate the objectives of class actions" – that is, enabling plaintiffs to redress wrongs even "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages . . . ." 445 U.S. at 339. Second, the Court observed that permitting pick-offs "would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement." *Id.* Both dangers appear to exist in the FLSA context, as well.

Yeboah, 2007 WL 3232509 at ** 2-3.

Similarly, in *Reyes v. Carnival Corp.*, 2005 WL 4891058 (S.D.Fla. May 25, 2005), the plaintiff sought relief on behalf of himself and others similarly situated under the FLSA. The defendant made an offer of judgment to the named plaintiff and moved to dismiss the action for lack of subject matter jurisdiction on the basis that the offer of judgment for more than complete relief rendered the case moot. The court disagreed, stating that "the defense strategy of providing an offer of judgment to the initial plaintiff in an FLSA collective action in order to bar the case from proceeding as to all similarly situated plaintiffs violates the very policies behind the FLSA... Permitting a defendant to evade a collective action by making an offer of judgment at the earliest possible time defeats the purpose of the collective action mechanism." *Reyes*, 2005 WL 4891058 at *3.

Numerous other courts have recognized concerns with allowing a defendant to "pick off" individual claimants before class certification. *See, e.g.*, *Rubery*, 494 F.Supp.2d at 180-81 ("In assessing whether dismissal is appropriate, this Court is mindful of the in-

herent danger that motions to dismiss grounded in a Rule 68 offer may be wielded as a strategic weapon to frustrate the FLSA's very object – ensuring that every employee receives 'a fair day's pay for a fair day's work.'" (citation omitted)); *Guerra v. Big Johnson Concrete Pumping, Inc.*, 2006 WL 2290517, *3 (S.D.Fla. June 26, 2006)("[A]llowing Defendant's offers of judgment to moot this case is contrary to the broad remedial purpose of the FLSA and the specific purpose of section 216(b), which is to reduce the number of multiple lawsuits filed against the same employer."); *see also Morales v. Arcadia v. Shannon Produce Farms*, 237 F.R.D. 700 (S.D.Ga. 2006) (granting plaintiff's motion to invalidate defendant's offer of judgment served while Section 216(b) notice to the putative class was pending); *Roble v. Celestica Corp.*, 627 F.Supp.2d 1008 (D.Minn. 2007) (conditionally certifying FLSA collective action after Rule 68 offer of judgment); *Bah v. Shoe Mania, Inc.*, 2009 WL 1357223 (S.D.N.Y. May 13, 2009)(denying defendant's motion to dismiss based on mootness); *Bowens v. Atlantic Maintenance Corp.*, 546 F.Supp. 2d 55 (E.D.N.Y. 2008)(same).

Furthermore, as the United States District Court for the District Court of Kansas has noted, one of the more troubling aspects of permitting defendants to use Rule 68 to "pick off" plaintiffs in a collective action is that such tactic essentially creates a "procedural loop" for FLSA plaintiffs. In *Geer v. Challenge Financial Investors Corp.*, 2006 WL 704993 (D.Kan. Mar. 14, 2006), the court explained this "procedural loop" as follows:

> It is possible for defendants to continue making offers of judgments to plaintiffs who opt in and then ask the court to consider dismissal based on

> the lack of subject matter jurisdiction. At the same time, plaintiffs may continue to introduce new plaintiffs whose presence will moot the issue of dismissal. Through the motion to dismiss, the court will be drawn into the parties' tussle over jurisdiction. . . Although nothing in the rules prevents parties from engaging in tactics to moot the case early on, this court is reluctant to allow defendants to bar the courtroom doors so early in the litigation.

Geer, 2006 WL 704933 at *3.

The Supreme Court has identified the inherent dangers in allowing defendants to "pick off" individual plaintiffs in a representative action by utilizing a Rule 68 offer of judgment. Recognizing that the Supreme Court's rationale applies with equal force in the context of an FLSA collective action, courts around the country have disallowed the "picking off" of FLSA representative plaintiffs. Symczyk respectfully suggests that these decisions, issued under factually identical circumstances to this case, are highly persuasive and should be followed.

V. Alternatively, And In Any Event, Dismissal Was Inappropriate At This Early Procedural Juncture

A plaintiff can only waive his or her rights under the FLSA with court approval or the approval of the Secretary of the Department of Labor. The Seventh, Eleventh and Federal Circuits have all found that purely private settlements of FLSA claims are unenforceable. *Walton v. United Consumers Club, Inc.*, 786 F.2d 303 (7th Cir. 1986); *Lynn's Food Stores, Inc. v. U.S.*, 679 F.2d 1350 (11th Cir. 1982); *O'Connor v. U.S.*, 308 F.3d 1233 (Fed.Cir. 2002); *cf. Lignore v.*

Univ. of Penn. Hospital, 2007 WL 1300733, *3, n.7 (E.D.Pa. May 1, 2007)("Though our court of appeals has not decided the issue, in *Burke v. Wackenhut Corp.*, 2007 WL 694302, *2 (M.D.Pa. Mar. 5, 2007), the court observed that 'in dicta, the Third Circuit has indicated that [wage] disputes may be settled privately, without court approval.' (citing *Coventry v. United States Steel Corp.*, 856 F.2d 514, 521 n. 8 (3d Cir. 1988)(observing that a release of an employee's rights under FLSA is invalid, but the release of a claim grounded in a factual dispute might not be precluded); *Watkins v. Hudson Coal Co.*, 151 F.2d 311, 314 (3d Cir.1945) (private settlement of a dispute over the amount of wages due an employee "may, under proper circumstances, be upheld")"). There was no review and/or approval by the district court of Appellees' offer of judgment to Symczyk. To the extent that such a review and approval is necessary, Symczyk suggests that it should occur after an appropriate record is set forth before the district court.

In *Luna v. Del Monte Fresh Produce (Southeast) Inc.*, 2008 WL 754452 (ND. Ga. Mar. 19, 2008), plaintiffs sought relief on behalf of themselves and others similarly situated under the FLSA. The parties conducted limited discovery and plaintiffs filed a motion for certification as an FLSA collective action. Subsequently, 47 plaintiffs opted into the lawsuit. Defendants then served Rule 68 offers of judgment on 42 of the opt-in plaintiffs. The United States Disstrict Court for the Northern District of Georgia, relying on *Lynn's Food Stores*, explained why the defendant's offers of judgment were procedurally premature and, thus, invalid:

> The Eleventh Circuit has held that FLSA claims may only be abridged or settled after a court reviews the proposed settlement to ensure that it is fair and reasonable. (citation omitted).
>
> . . .
>
> Defendants have not presented its Rule 68 offers to the Court for approval, with good reason. At this stage in the litigation, there is absolutely no basis for determining whether the offers are fair and reasonable. The parties have not conducted any merits discovery or provided even an estimate as to the amount plaintiffs might be entitled to recover on their FLSA and AWPA claims.

Id., 2008 WL 754452, *12.

This case was at an even earlier procedural juncture than in *Luna*. The parties had not yet begun discovery. The district court held a Fed.R.Civ.P. 16 Pretrial Conference with counsel for the Parties on March 8, 2010. Following that conference, on March 10, 2010, the district court entered an order setting forth a discovery and motions practice schedule designed to address the conditional certification issues under Section 216(b).[3] Consistent with the

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[3] The district court distinguished the cases relied on by Symczyk, above, from this case on the grounds that those cases declined to dismiss an FLSA collective action "because other individuals had already opted in to join the collective action." (LA. 3, Memorandum re: Motion to Dismiss for Lack of Subject Matter Jurisdiction). Symczyk has had no opportunity to file a motion for conditional certification and to facilitate notice pursuant to Section 216(b). In accordance with the district court's scheduling order entered on March 10, 2010, the parties were to have an initial ninety (90) day discovery period, at the close of which Symczyk was to move for conditional certification.

Supreme Court's admonition in *Roper* and the instruction set forth by this Court in *Weiss*, the district court should have let the process for collective action certification "play out," pursuant to the process that it created.

VI. CONCLUSION

For all of the foregoing reasons, Symczyk respectfully requests that this Court reverse the district court's Order granting Appellees' motion to dismiss for lack of subject matter jurisdiction.

Respectfully submitted,

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(.1.A. 38, Scheduling Order). However, Appellees served Symczyk with a Fed.R.Civ.P. 68 Offer of Judgment on February 18, 2010 and filed the motion to dismiss that is the subject of this appeal on March 23, 2010.

CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Rule 46.1 of the Local Appellate Rules for the United States Court of Appeals for the Third Circuit, Gary F. Lynch, R. Bruce Carlson and Gerald D. Wells, III, counsel for Appellant, certify that they are members in good standing of the bar of the United States Court of Appeals for the Third Circuit.

/s/ Gary F. Lynch

/s/ R. Bruce Carlson

/s/ Gerald D. Wells, III

CERTIFICATE OF COMPLIANCE

Pursuant to, Federal Rule of Appellate Procedure 32(a)(7)(c), the undersigned counsel of record certifies this Brief of Appellant complies with the type and volume limitations of Fed. R. App. P. 32(a)(7)(13).

1. According to the word count in the word processing system employed in drafting this brief (Microsoft Word), the Brief of Appellant contains 6,852 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

2. This Brief has been prepared using Microsoft Word in Times New Roman 14-point font.

/s/ Gary F. Lynch

CERTIFICATE OF VIRUS CHECK

I further certify that the E-Brief was scanned for viruses using the Symantec anti-virus program.

/s/ Gary F. Lynch

CERTIFICATE OF SERVICE

I hereby certify that on this the 4th day of October, 2010, that the foregoing BRIEF OF APPELLANT and incorporated Volume I of the Joint Appendix were served on counsel of record via the Court's electronic filing system and on the following by overnight commercial carrier (Federal Express):

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I also certify that on 4th day of October, 2010, ten bound copies of the BRIEF OF APPELLANT and incorporated Volume I of the Joint Appendix were served by mailing through a third party commercial carrier (Federal Express) to the Office of the Clerk, United States Court of Appeals for the Third Circuit.

/s/ Gary F. Lynch

CERTIFICATE OF IDENTICAL COMPLIANCE OF BRIEFS

I also certify that the text of the hard copies and the E-Brief are identical.

/s/ Gary F. Lynch

CASE NO. 10-3178

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LAURA SYMCZYK, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED
Plaintiff, Appellant,

v.

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORPORATION
Defendants, Appellees.

Appeal from the United States District Court
For the Eastern District of Pennsylvania
in Civil Action No. 09-5782
Michael M. Baylson,
United States District Judge

APPENDIX – VOLUME I OF II (pp. 1-17)

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Order that Plaintiff shall file a brief in support of continued federal jurisdiction and a motion for class certification under Fed.R.Civ.P. 23 by 6/10/10 entered on 5/19/10	R. 29	13
Order that the Complaint is dismissed for lack of federal jurisdiction and the case is remanded to state court entered on 6/11/10	R. 34	14
Order that the Court's 6/11/10 Order is vacated and that Plaintiff's FLSA claim is dismissed for reasons stated in the Court's 5/19/10 memorandum entered on 6/24/10	R. 37	16

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Case No.: 2:09-cv-05782-MMB
Honorable Michael M. Baylson

LAURA SYMCZYK, AN INDIVIDUAL, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORPORATION,
Defendants.

NOTICE OF APPEAL

Notice is hereby given that Laura Symczyk, plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Third Circuit from: 0 the Memorandum Re: Motion to Dismiss for Lack of Subject Matter Jurisdiction, entered in this action on the 19th day of May, 2010 [Docket #28]; 2) the Order that Plaintiff shall file a brief in support of continued federal jurisdiction and a class certification motion under Fed.R.Civ.P. 23 by 6/10/2010, that Defendant shall have seven days to respond, and that the Court will hold Defendants Motion to Dismiss under advisement, entered in this action on the 19th day of May, 2010 [Docket #29]; 3) the Order that Plaintiff's Motion to Vacate is granted, that the Complaint is dismissed without prejudice for lack of federal jurisdiction, and that the case is remanded to state court, entered in this action on the 11th day of June, 2010 [Docket #34]; and 4) the Order vacating the Court's 6/11/2010 Order, dismissing Plaintiff's FLSA claim and directing the Clerk to close this case,

entered in this action on the 20 day of June, 2010 [Docket #37].

Plaintiff respectfully requests that all documents filed in this case be transmitted with the record on appeal.

Dated: July 19, 2010

Respectfully submitted,

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 09-5782

LAURA SYMCZYK, AN INDIVIDUAL, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORPORATION,
Defendants.

MEMORANDUM RE: MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Baylson, J. May 19, 2010

In this action, Plaintiff Laura Symczyk alleges that Defendants Genesis HealthCare Corporation and ElderCare Resources Corporation (collectively, "Defendants") violated the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. ("FLSA"), and Pennsylvania law, by implementing an automatic meal break deduction policy. (Compl ¶ 1, Docket No. 1.) Symczyk brought the action as a collective action under 29 U.S.C. § 261(b), on behalf of herself and similarly situated individuals. Presently before the Court is Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction (Docket No. 12), pursuant to Federal Rule of Civil Procedure 12(b)(1). The pending Motion seeks dismissal based on Defendants' offer of judgment, which, according to Defendant, exceeds all damages Symczyk can recover under the FLSA, in

accordance with Federal Rule of Civil Procedure 68 ("Rule 68").

I. Factual and Procedural Background

Symczyk worked as a Registered Nurse at Pennypack Center, and was an employee of Defendants from April 2007 to December 2007. Symcyzk commenced this FLSA collective action on December 4, 2009, which identified the class as comprising "all non-exempt employees of Defendants whose pay is subject to an automatic meal break deduction even when they perform compensable work dining their meal breaks." (Compl. ¶ 14, Docket No. 1.)[1]

On February 18, 2010, Defendants filed an Answer to the Complaint. (Docket No. 8.) The same day, Defendants served Symczyk's counsel with an offer of judgment, pursuant to Rule 68, in the amount of "$7,500.00 in alleged unpaid wages, plus attorneys' fees, costs and expenses as determined by the Court." (Mot. to Dismiss, Ex. A, at 2.) Defendants contend, and Symczyk does not contest, that Symczyk "never

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[1] The Complaint further provides,

> These persons include, but are not limited to, secretaries, housekeepers, custodians, clerks, porters, registered nurses, licensed practical nurses, nurses' aides, administrative assistants, anesthetists, clinicians, medical coders, medical underwriters, nurse case managers, nurse interns, nurse practitioners, practice supervisors, professional staff nurses, quality coordinators, resource pool nurses, respiratory therapists, senior research associates, operating room coordinators, surgical specialists, admissions officers, student nurse technicians, trainers, and transcriptionists employed at any of Defendants' facilities during the three years preceding the filing of this action.

(Compl ¶ 14.)

responded, effectively rejecting the Offer." (Mot. to Dismiss 2; see also Resp. (Docket No. 19).)

On March 11, 2010, this Court entered an Order providing for "an initial ninety-day period of discovery, at the close of which [Symczyk] will move for conditional certification under § 216(b) of the FLSA." (Docket No. 10, ¶ 1.) On March 23, 2010, Defendants filed the pending Motion to Dismiss for Lack of Subject Matter Jurisdiction. Subsequently, on April 23, 2010, Symczyk filed an Amended Class/Collective Action Complaint (Docket No. 22), which differed from the Complaint by adding allegations pursuant to Federal Rule of Civil Procedure 23 on behalf of a class seeking relief under Pennsylvania state law. Symczyk's Amended Complaint provides the same definition of the class as the Complaint (Am. Compl. ¶ 20).

II. The Parties' Contentions

Defendants' Motion to Dismiss is based upon their Rule 68 offer of judgment. In support of their Motion, Defendants assert that they offered Symczyk "compensation that is equal to or greater than the potential relief she could obtain at trial." (Mot. to Dismiss 5.) According to Defendants,"a defendant's offer to pay the full amount of the plaintiff's potential recovery... renders the plaintiff's claim moot because she loses a legally cognizable interest in the outcome of the litigation," thereby rendering this case subject to dismissal. (Mot. to Dismiss 3.)

In response, Symczyk contends that courts "heavily disfavor[]" "Defendants' strategic attempt to 'pick-off the Plaintiff before the Court can meaningfully consider and decide the [§] 216(b) motion." (Resp. 1.) Symczyk argues that "the Third Circuit has consid-

ered and rejected the use of such tactic in the context of other representative actions, in particular a Rule 23 class action," and that courts have recognized that there is no distinction between Rule 23 and § 216(b) cases for purposes of "strategic mooting by defendants through the use of a Rule 68 offer of judgment." (Resp. 7.) Symczyk thereby concludes that the Court, rather than dismissing the action as moot, should permit Symyczk to "file a class certification motion, and that motion would 'relate back' to the filing of the complaint, thereby eliminating any concerns that the representative plaintiff lack[s] standing to sue." (Resp. 4-5.)

Defendants reply that dismissal is appropriate even though "this case is an opt-in collective action under § 216(b)," because "the opt-in procedure under § 216(b) is fundamentally different from the opt-out procedure in Rule 23 class actions," and both the "plain language of the FLSA and its legislative history," as well as "the great weight of authority" indicate that Defendants' Offer moots Symczyk's claim. (Mat. to Dismiss 7; see also Reply 2-13 (Docket No. 24).)

III. Discussion

Symczyk does not take issue with Defendants' assertion that the damages offered exceed any amount of unpaid wages sought; thus, the only legal question the Court must address is whether the rejected Rule 68 offer renders this case moot and divests this Court of subject matter jurisdiction over the action.

For a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), the plaintiff bears the burden of persuading

the Court that subject matter jurisdiction exists. Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991). The Court "may not presume the truthfulness of [P]laintiff's allegations, but rather, must evaluate for itself the merits of the jurisdictional claims." Hedges v. United States, 404 F.3d 744, 750 (3d Cir. 2005) (internal quotation marks and alterations omitted).

Article III of the United States Constitution limits the jurisdiction of federal courts to "actual cases and controversies." U.S. Const. art. III, § 2. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." L.A. County v. Davis, 440 U.S. 623, 631 (1979) (internal quotation marks omitted). Many Courts, including the Third Circuit, have held that an offer of settlement under Rule 68, if undoubtedly sufficient to compensate the plaintiff for all damages, will result in dismissal for lack of jurisdiction, regardless of whether the offer is accepted. "An offer of complete relief will generally moot the plaintiffs claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation." Weiss v. Regal Collections, 385 F.3d 337, 340 (3d Cir. 2004).[2] In cases in which the mootness doctrine applies, subject matter jurisdiction no longer exists

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[2] See also Rand v. Monsanto Co., 926 F.2d 596, 598 (7th Cir. 1991) ("Once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate and a plaintiff who refuses to acknowledge this loses outright, under Fed. R. Civ. P. 12(b)(1), because he has no remaining stake." (internal citations omitted)); 13A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Jurisdiction 2d § 3533.2, at 236 (2d ed. 1984) ("Even when one party wishes to persist to judgment, an offer to accord all of the relief demanded may moot the case.").

and the case is properly dismissed. See LA. County, 440 U.S. at 631.

As both parties recognize, neither the Supreme Court nor the Third Circuit has addressed the specific question presented by Defendants' Motion to Dismiss, of whether a Rule 68 offer of judgment made to the named plaintiff in a FLSA action moots the collective action claims. (Resp. 5; Reply 2.) Instead, the Third Circuit held in Weiss, a class action commenced pursuant to Federal Rule of Civil Procedure 23 ("Rule 23"), that when the defendants "user] the Rule 68 offer to thwart the putative class action before the certification question could be decided," the class action is not mooted, the plaintiff should be permitted to file the certification motion, and "the appropriate course is to relate the certification motion back to the filing of the class complaint." 385 F.3d at 348-49. It is not implausible that Symczyk filed the Amended Complaint, which added allegations of a class seeking relief under Pennsylvania Law, but pursuant to Rule 23, to come under the Weiss holding.

Although the Third Circuit has not determined whether Weiss's "relation back" doctrine applies to FLSA collective actions, numerous other courts have addressed the issue. Symczyk points the Court to 'a Fifth Circuit decision as well as multiple district court cases from the Second Circuit, which held that Rule 68 Offers of Judgment do not moot the underlying FLSA collective actions.[3]

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[3] See Sandoz v. Cingular Wireless , LLC, 553 F.3d 913, 920 (5th Cir. 2008); Nash v. CVS Caremark Corp.,—F.Supp.2d—, No. 09-0079, 2010 WL 446178, at *1-3 (D.R.I. Feb. 9, 2010); Bah v. Shoe Mania, Inc., No. 08-9380, 2009 WL 1357223 (S.D.N.Y

In 1980, the Supreme Court explained that allowing a defendant to use a Rule 68 offer of judgment to "pick-off" an individual claimant in a Rule 23 class action "before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement." Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 339 (1980). In light of this concern, the Fifth Circuit applied the "relation back" doctrine articulated in Weiss to the FLSA collective action at issue, reasoning as follows:

> The status of a case as being an "opt in" or "opt out" class action has no bearing on whether a defendant can unilaterally moot a plaintiff's case through a Rule 68 offer of judgment. Although the differences between Rule 23 class actions and FLSA § 216(b) collective actions alter the conceptual moonless inquiry, each type of action would be rendered a nullity if defendants could simply moot the claims as soon as the representative plaintiff files suit. Thus, the policies behind applying the "relation back" principle for Rule 23 class actions apply with equal force to FLSA § 216(b) collective actions.

May 13, 2009); Bowens v. Atl. Maint. Corp., 546 F.Supp.2d 55, 58 (E.D.N.Y. 2008); Yeboah v. Cent. Parking Sys., No. 06-0128, 2007 WL 3232509 at *3-6 (E.D.N.Y. Nov. 1, 2007); Rubery v. Buth-Na-Bodhaige, Inc., 494 F.Supp.2d 178, 181 (W.D.N.Y. 2007); Roble v. Celestica Corp., 627 F.Supp.2d 1008-1013 (D. Minn. 2007); Guerra v. Big Johnson Concrete Pumping, Inc., No. 05-1427, 2006 WL 2290517, at *2-3 (S.D. Fla. June 16, 2006); Geer v. Challenge Fin. Investors Corp., No. 05-1109, 2006 WL 704933, at *3 (D.Kan. Mar. 14, 2006); Reyes v. Carnival Corp., No. 04-21861, 2005 WL 4891058, at *3 (S.D. Fla. May 25, 2005).

Sandoz v.Cingular Wireless, LLC, 553 F.3d 913, 920 (5th Cir. 2008).

The opposite conclusion, however, has been reached by numerous other district courts[4] in the Second Circuit[5] For example, in Darboe v. Goodwill Industries of Greater New York & Northern New Jersey, Inc., 485 F. Supp. 2d 221 (E.D.N.Y. 2007), the District Court for the Eastern District of New York took care to distinguish Weiss from FLSA collective actions on the basis that, in contrast to a Rule 23 action where "once a class is certified, all those falling within the description of the class certified are deemed a part of the case and will be bound by the outcome unless they take the affirmative action of opting out of the matter," members of a FLSA class must take the "affirmative step of 'opting in' to the

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[4] Defendants also point out that the Eleventh Circuit similarly concluded that an action was moot because contrast to the Rule 23 plaintiff, [the] § 216(b) plaintiff (in the case] has no claim that he is entitled to represent other plaintiffs." Cameron-Grant v. Maxim Health Care Servs. Inc., 347 F.3d 1240, 1249 (11th Cir. 2003) (per curiam). Cameron-Grant is distinguishable from the present case, however, because the plaintiff who contended that the action was not mooted by a Rule 68 offer from the defendant, previously stipulated to dismiss his claims in their entirety, and thus, had voluntarily dismissed his claims. See id. at 1244.

[5] Louisdo v. Am. Telecomms. Inc., 540 F. Supp. 2d 368, 373-73 (E.D.N.Y. 2008); Darboe v. Goodwill Indus. of Greater N.Y. & N. N.J., Inc., 485 F. Supp. 2d 221 (E.D.N.Y. 2007); Briggs v. Arthur T. Mott Real Estate LLC, No. 06-0468, 2006 WL 3314624, at *4 (E.D.N.Y. Nov. 14, 2006); Ward v. Bank of N.Y., 455 F. Supp. 2d 262, 268-70 (S.D.N,Y. 2006); Vogel v. Am. Kiosk Mgmt., 371 F. Supp. 2d 122, 127-28 (D. Conn. 2005); Thomas v. Interland, Inc., No. 02-3175, 2003 WL 24065651, at *3-4 (N.D. Ga. Aug. 25, 2003); Mackenzie v. Kindred Hosps. E., L.L.C., 276 F, Supp. 2d. 1211, 1219 (M.D. Fla. 2003).

action to be a part of the action and bound by its terms." Id. at 223-24. The Darboe court reasoned that this distinction indicated that under the FLSA, "the named plaintiff is deemed to represent himself only," and thus, "application of Rule 68 to moot a single plaintiff's claim creates no conflict with the policy underlying the collective action procedure." Id. at 224

In Briggs v. Arthur T. Mott Real Estate LLC, the district court for the Eastern District of New York reconciled the contrary conclusions reached by various courts, by explaining that "courts have held that a Rule 68 offer of judgment moots an FLSA collective action," in cases in which (1) "no other similarly situated individuals have opted in," and (2) "the offer of judgment satisfies all damages of the plaintiff, plus all costs and attorney's fees." 2006 WL 3314624, at *2. Indeed, all of the district court cases[6] cited by Symczyk declined to dismiss a FLSA collective action because other individuals had already opted in to join

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[6] The only other case cited by Symczyk, Sandoz, a Fifth Circuit decision, did not involve any of the factors articulated above. Instead, the Fifth Circuit recognized that "in theory a Rule 68 offer of judgment could moot a FLSA collective action," and declined to apply the "relation back" doctrine to the case at hand. 555 F.3d 921-922. The Sandoz court clarified that "relation back is warranted only when the plaintiff files for certification without undue delay." Id at 921. Because the plaintiff in Sandoz filed her motion to certify thirteen months after filing her complaint, the doctrine would only be applied if on remand, the district court determined that the named plaintiff "timely sought certification of her collective action." Id. Unlike Sandoz, no motion to certify the class action is pending in this case. In addition, given the differences between this case and all the district court cases cited by Symczyk, the Court declines to follow Sandoz.

the collective action,[7] it was unclear whether the Rule 68 offer fully satisfied the plaintiff's claims,[8] or the plaintiff had already filed a motion for conditional certification under § 216(b).[9]

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[7] See Nash, 2010 WL 446178, at *1 ("[O]ther parties have o pted into this action and wish to have their claims resolved as part of a 'collective action' with Plaintiff."); *Yeboah*, 2007 WL 3232509, at *5 (concluding that the presence of an additional individual in the collective action "requires the conclusion" that the Court retains subject matter jurisdiction over the action); Rubery, 494 F. Supp. 2d at 181 (finding dismissal to be premature when "more than fifty individuals ha[d] executed and filed forms consenting to join the action as a party plaintiff"); Reyes, 2005 WL 4891058, at *3 (distinguishing the case at hand from a prior case finding a collective action to be moot, because "two other persons . . . have opted in to this suit, and the defendant] has not made offers of judgment to them"); see also Bowens 546 F. Supp. 2d at 79 ("[T]here was clear evidence at the outset of this case that other individuals were interested in joining. Indeed, at one time, there were no fewer than six ... employees who had filed notices of consent . ."); Roble, 627 F. Supp. 2d at 1013 (declining to find the action to be moot, because "the named plaintiffs in this action have identified other potential... employees with an interest in this litigation"); Guerra, 2006 WL 2290517, at *2-3 (declining to find a FLSA action to be moot when another employee had joined the collective action before the offer of judgment was made); Geer, 2006 WL 704933, at *3 (finding that "dismissal is not appropriate" because "the court received notice of a third plaintiff who has not received an offer of settlement").

[8] See Geer, 2006 WL 704933, at *3 (finding dismissal to be inappropriate because the defendants did not explain how they arrived at the settlement amount they offered to the plaintiffs, the "plaintiffs argue that the offers are not sufficient," and thus, the "court is uncertain whether [the offer of judgment] amount constitutes full judgment").

[9] See Bah 2009 WL 1357223, at *1-2 (declining to dismiss when the plaintiff had a motion for certification pending, and had attached an affidavit identifying a "friend and fanner co-

The present case does not involve any such facts. Symczyk does not contend that other individuals have joined her collective action. Thus, this case, like each of the district court cases cited by Defendants, which concluded that a Rule 68 offer of judgment mooted the underlying FLSA collective action, involves a single named plaintiff.[10] In addition, Symczyk does not contest Defendants' assertion that the Rule 68 offer of judgment fully satisfied her claims. Under the Court's March 11, 2010 Scheduling Order, Plaintiff was given until June 10, 2010 to file a motion of conditional class certification. (Docket No. 10, ¶ 1.) The Court, however, was unaware when it issued the Scheduling Order that Defendants had already made Symczyk a Rule 68 offer of judgment.

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worker, along with other employees" whom the plaintiff had observed as being potential members of the class); Bowens, 546 F. Supp. 2d at 80 (denying a motion to dismiss based on an offer of judgment when a motion for conditional certification was pending); Roble, 627 F. Supp. 2d at 1013 (same); see also Morales-Arcadio v. Shannon Produce Farms, 237 F.R.D. 700, 702 (S.D. Ga. 2006) (striking an offer of judgment when it was made after the court had conditionally certified the class).

[10] See Darboe 485 F. Supp. 2d at 224 (concluding that the collective action had been mooted "[w]here no class action has opted in to the collective action"); Briggs, 2006 WL 3314624, at *4 ("[T]here are no putative class members or collective action plaintiffs to represent. No collective plaintiffs have opted into this action and class certification has not been sought or granted. Thus, only Plaintiffs individual claims are at stake."); Vogel v. Am. Kiosk Mgmt., 371 F. Supp. 2d 122, 127 (D. Conn. 2005) ("[W]ithout the inclusion of other active plaintiffs who have 'opted-in' to the suit, the section 216(b) plaintiff simply presents only her claims on the merits.") Section 216(b) provides that "no employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which action is brought." 29 U.S.C. § 216(b).

In view of the Rule 23 allegations now in the Amended Complaint, the Court will set the same date, June 10, 2010, for Symczyk to file a Motion for Rule 23

Certification, to be accompanied by a brief explaining how this Court retains jurisdiction over this action. The Court has tentatively concluded that Defendant? Rule 68 offer of judgment moots this collective action, and thus, that this collective action should be dismissed for lack of subject matter jurisdiction. In that event, the Court would likely decline, in its discretion, to exercise supplemental jurisdiction over Symczyk's claims under Pennsylvania law, which cart be re-filed in state court. Although Symczyk will be given an opportunity to justify continued federal jurisdiction under Rule 23, the Court expresses doubt as to whether Symczyk can make such a showing, because the Rule 23 allegations in the case are limited to the state law claims, and Rule 23 does not itself confer jurisdiction. An appropriate Order follows.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 09-5782

LAURA SYMCZYK, AN INDIVIDUAL, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORPORATION,
Defendants.

ORDER

AND NOW, on this 19th day of May, 2010, for the reasons stated in the foregoing Memorandum, upon due consideration of Defendants Genesis Healthcare Corporation and Eldercare Resources Corporation's (collectively, "Defendants") Motion to Dismiss for Lack of Subject Matter Jurisdiction (Docket No. 12), it is hereby ORDERED as follows:

1. Plaintiff Laura Symczyk shall file a brief in support of continued federal jurisdiction and a motion to certify a class under Federal Rule of Civil Procedure 23, by June 10, 2010;
2. Defendant shall have seven (7) days to respond; and
3. The Court will hold the Motion to Dismiss under advisement.

BY THE COURT:

/s/ Michael M. Baylson
Michael M. Baylson, U.S.D.J

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 09-5782

LAURA SYMCZYK, AN INDIVIDUAL, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORPORATION,
Defendants.

ORDER

By Order dated May 19, 2010 (Doe. No. 29), Plaintiff's counsel was directed to file a brief in support of continued federal jurisdiction and a motion to certify a class, by June 10, 2010, and the Court ruled that it would hold under advisement Defendants' Motion to Dismiss the Complaint.

Plaintiff's counsel has since filed a Statement of Plaintiff's Counsel Regarding Jurisdiction (Doc. No. 32), in which he acknowledges that federal jurisdiction does not exist in this case and moves to vacate the June 2010 class certification motion deadline due to lack of subject matter jurisdiction. Defendants do not oppose this course of action.

Accordingly, for the reasons stated in the Court's May 19, 2010 Memorandum and in the subsequently filed documents, it is hereby ORDERED as follows:

1. Plaintiff's Motion to Vacate the June 10, 2010 Class Certification Motion Deadline Due to Lack of

Subject Matter Jurisdiction is GRANTED (Doc. No. 33).

2. The Complaint is DISMISSED without prejudice for lack of federal jurisdiction.

3. The case is REMANDED to state court.

4. The Clerk shall close this case.

BY THE COURT:

/s/ Michael M. Baylson
Michael M. Baylson, U.S.D.J

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 09-5782

LAURA SYMCZYK, AN INDIVIDUAL, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORPORATION,
Defendants.

ORDER

For the reasons stated in the Court's May 19, 2010 Memorandum (Docket No. 19), upon consideration of the parties' submissions acknowledging that an independent basis for federal jurisdiction over Plaintiffs state law claims no longer exists, and the parties' agreement that the statute of limitations for the state law claims is tolled from the date of the originally filed state complaint,[1] it is hereby **ORDERED** by agreement as follows:

1. The Court's Order dated June 11, 2010 is **VACATED**;

2. Plaintiff's FLSA claim is dismissed with prejudice for the reasons stated in the Court's May 19, 2010 Memorandum;

3. In accordance with 28 U.S.C. § 1367C, the Court declines to exercise supplemental jurisdiction over

[1] See Symczyk v. Gensis Healthcare Corp, No. 10-cv-1378-MMB.

Plaintiff's remaining state law claims and therefore dismisses those claims without prejudice; and.

4. The Clerk of the Court shall mark this case **CLOSED**.

BY THE COURT:

/s/ Michael M. Baylson
Michael M. Baylson, U.S.D.J

June 24, 2010
Date

CASE NO. 10-3178

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LAURA SYMCZYK, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED
Plaintiff, Appellant,

v.

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORPORATION
Defendants, Appellees.

Appeal from the United States District Court
For the Eastern District of Pennsylvania
in Civil Action No. 09-5782
Michael M. Baylson,
United States District Judge

APPENDIX – VOLUME II of II (pp. 18-141)

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Brief in Opposition to Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction filed by Laura Symczyk on 4/16/10	R. 19	64
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IN THE UNITED STATED DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

Civil Action No.:
JURY TRIAL DEMANDED

LAURA SYMCZYK, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED
Plaintiff, Appellant,

v.

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORPORATION
Defendants, Appellees.

COLLECTIVE ACTION COMPLAINT

Plaintiff Laura Symczyk, on behalf of herself and others similarly situated alleges as follows:

1. This is a collective action under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("ELSA"), brought on behalf of all persons who, at any time during the past three years and up until the date of entry of judgment are or were employed by Defendants (as hereinafter defined) and whose pay was subject to an automatic meal break deduction even when those persons performed compensable work during such unpaid "meal break."

JURISDICTION AND VENUE

2. This Court has original jurisdiction over Plaintiff's claims pursuant to 29 U.S.C. §216(b) and 28 U.S.C. §1331.

3. Venue for this action properly lies in the Eastern District of Pennsylvania, pursuant to 28 U.S.C. §1391(b), because the claim arose in this judicial district

PARTIES

4. Genesis Healthcare Corporation ("Genesis") is an integrated skilled nursing center and assisted living communities enterprise headquartered at 101 E. State Street, Kennett Square, Pennsylvania. Genesis is comprised of 200 skilled nursing centers and assisted living communities throughout 13 eastern states.

5. Upon information and belief, Genesis is a parent corporation of Eldercare Resources Corporation, d/b/a Genesis Eldercare ("Eldercare"):

6. Genesis and Eldercare are related organizations through, for example, common membership, governing bodies, trustees and/or officers and benefit plans.

7. Upon information and belief, at all times, the wage and hour and all related employee compensation policies of Genesis and Eldercare are and were centrally and collectively dictated, controlled, and ratified.

8. Upon information and belief; Genesis and Eldercare share common management and have common ownership.

9. As such, Genesis and Eldercare are the employer – single, joint or otherwise – of the Plaintiff and class members.

10. For purposes of this complaint, Genesis and Eldercare are hereinafter collectively referred to as "Defendants."

11. Defendants have approximately 36,000 employees.

12. Plaintiff, Laura Symczyk, is an adult individual residing in Philadelphia. Plaintiff was employed by Defendants from April, 2007 through December, 2007 and worked at Pennypack Center. She spent her time working as a Registered Nurse at the facility. While working for Defendants, Plaintiff was regularly required to perform compensable work during unpaid "meal breaks."

13. Plaintiff consents in writing to be a party to this collective action pursuant to 29 U.S.C. §216(b).

FACTUAL BACKGROUND

14. This action is filed on behalf of all non-exempt employees of Defendants whose pay is subject to an automatic meal break deduction even when they perform compensable work during their meal breaks. These persons include, but are not limited to, secretaries, housekeepers, custodians, clerks, porters, registered nurses, licensed practical nurses, nurses' aides, administrative assistants, anesthetists, clinicians, medical coders, medical underwriters, nurse case managers, nurse interns, nurse practitioners, practice supervisors, professional staff nurses, quality coordinators, resource pool nurses, respiratory therapists, senior research associates, operating room coordinators, surgical specialists, admissions officers, student nurse technicians, trainers, and transcriptionists employed at any of Defendants' facilities during the three years preceding the filing of this action.

15. Given the demands of the health care industry and staffing shortages, Defendants know that to get the tasks done that it assigns to Plaintiff and class members, Plaintiff and class members have to work through their unpaid "meal breaks."

16. All non-exempt employees of Defendants are subjected to Defendants' "Meal Break Deduction Policy."

17. Upon information and belief, Defendants maintain the "Meal Break Deduction Policy" at all of its facilities.

18. Under the "Meal Break Deduction Policy," Defendants' computerized time and attendance system automatically deducts a 30 minute meal period per work shift.

19. Under Defendants' "Meal Break Deduction Policy," Defendants improperly and illegally shift the burden to Plaintiff and class members to ensure that non-qualifying "meal breaks" are not deducted from their pay.

20. Plaintiff and class members often perform compensable work for Defendants during their uncompensated "meal breaks."

21. Defendants do not ensure that Plaintiff and the class members are completely relieved of their work duties during their uncompensated "meal breaks."

22. Plaintiff and class members are routinely not completely relieved of their job duties during their uncompensated "meal breaks."

23. Plaintiff and class members routinely are required to stay at their duty post during their uncompensated "meal breaks."

24. Defendants do not prohibit Plaintiff and class members from working during their "meal breaks" and routinely suffers or permits Plaintiff and class members to perform such work.

25. Defendants routinely fail to ensure that unauthorized work is not being performed during employee "meal breaks."

26. In fact, although Defendants automatically deduct 30 minute meal periods, Defendants expect Plaintiff and class members to be available to work throughout their shifts and consistently require its employees to work during unpaid "meal breaks."

27. Plaintiff and class members are expected to eat without any change in demands from patients or relief by additional staff.

28. Plaintiff and class members are often required to respond to pages, as well as requests by patients, co-workers and management, during unpaid "meal breaks."

29. Defendants know and/or have reason to believe that Plaintiff and class members perform work during their unpaid "meal breaks."

30. Plaintiff and class members perform work for Defendants, on Defendants' premises, in plain sight, and often at management's request during their unpaid "meal breaks."

31. Defendants have observed Plaintiff and class members working through their unpaid "meal breaks." Defendants have directed Plaintiff and class members to work during their unpaid "meal breaks."

32. Even though Defendants know that Plaintiff and class members are working during "meal breaks," Defendants fail to compensate Plaintiff and

class members for their work, electing instead to sit back and accept the benefits of Plaintiff and class members' uncompensated work.

33. Some evidence generally reflecting the number of uncompensated hours worked by each class member and the compensation rates for the relevant work periods is in the possession of Defendants.

34. While Plaintiff is unable to state at this time the exact amount owed to the class, Plaintiff believes that such information will become available during the course of discovery. When an employer fails to keep complete and accurate time records, employees may establish the hours worked solely by their testimony and the burden of overcoming such testimony shifts to the employer.

COLLECTIVE ACTION ALLEGATIONS

35. The preceding paragraphs are incorporated by reference as if the same were fully set forth herein.

36. Plaintiff brings this FLSA collective action on behalf of herself and all other persons similarly situated pursuant to 29 U.S.C. §§ 207 and 216(b), specifically, as follows:

> All persons employed within the three years preceding the filing of this action by Defendant, whose pay was subject to an automatic 30 minute meal period deduction even when they performed compensable work during the unpaid "meal break."

Upon information and belief, Plaintiff believes that the definition of the class will be further refined during the course of discovery.

37. Prior to discovery, Plaintiff is unable to state the exact number of the class members but estimates the class to exceed several thousand individuals.

38. There are questions of law and fact common to the class which predominate over any questions affecting individual members only. These factual and legal questions include *inter alia*:

a. Whether Plaintiff and class members were expected to and/or mandated to regularly work during unpaid meal breaks;

b. Whether Defendants failed to pay Plaintiff and class members for all hours that they worked because of the fact that they automatically deducted 30 minute meal periods despite the fact that Plaintiff and class members regularly performed compensable work during "meal breaks";

c. Whether Defendants failed to pay Plaintiff and class members all overtime compensation due to them by virtue of their "Meal Break Deduction Policy";

d. The correct statute of limitations for Plaintiff's and class members' claims;

e. The correct method of calculating back overtime pay;

f. Whether Plaintiff and class members are entitled to compensatory damages, and if so, the means of measuring such damages;

g. Whether Plaintiff and class members are entitled to restitution;

h. Whether Defendants are liable for pre judgment interest; and

i. Whether Defendants are liable for attorney's fees and costs.

10. Defendants have acted and refused to act on grounds generally applicable to the class.

11. The claims of the representative Plaintiff are typical of the claims of the class in that Plaintiff was denied overtime wages as a result of Defendants' uniform policy of not compensating its non-exempt employees for all hours worked. This is the predominant issue which pertains to the claims of each and every class member.

12. The collective action mechanism is superior to other available methods for a fair and efficient adjudication of the controversy.

13. Plaintiff will fairly and adequately protect the interests of the class, as her interests are in alignment with those of the class, i.e., to prove and then eradicate Defendants' illegal employment practice of not paying overtime wages to their non-exempt employees.

14. Counsel for Plaintiff will adequately protect the interests of the class. Plaintiff has retained counsel experienced in class action litigation in general, and employment litigation in particular. Indeed, counsel has previously served as class counsel in employment litigation.

15. Plaintiff and the class she represents have suffered and will continue to suffer irreparable damage from the illegal policy, practice and custom regarding Defendants' pay practices.

16. Defendants have engaged in a continuing violation of the FLSA.

17. Plaintiff, as well as the individuals she represents, was denied overtime wages as a result of Defendants' pay practices. This violation was intended by Defendants and was willfully done.

18. Defendants' action in denying overtime wages to Plaintiff was intentional and constitutes a willful violation of the FLSA.

FLSA OVERTIME VIOLATION

19. The allegations set forth in the preceding paragraphs are incorporated herein.

20. At all relevant times, Defendants have been employers engaged in interstate commerce consistent with 29 U.S.C. §§206(a) and 207(a). At all relevant times, Defendants employed Plaintiff and each member of the collective action class consistent with the terms of the FLSA.

21. At all relevant times, Defendants have had annual gross revenues in excess of $500,000.00.

22. As a consequence of Defendants' employment practices whereby it automatically deducts thirty minutes for meal breaks from the pay of hourly, non-exempt employees, Plaintiff and class members were denied statutory overtime wages.

23. Plaintiff and class members were employees of Defendants within the meaning of the FLSA and, as such, were entitled to the benefits of the FLSA's overtime wage requirements.

24. Defendants' policy of denying Plaintiff and class members overtime wages represents and results in a violation of the FLSA's minimum wage requirements.

25. Defendants have failed to pay appropriate overtime wages under the FLSA.

WHEREFORE, Plaintiff respectfully requests:

A. All applicable statutory damages;

B. A Declaration that Defendants have violated the FLSA;

C. An Order designating this action as a collective action and directing the issuance of notice pursuant to 29 U.S.C. §216(b);

D. An Order appointing Plaintiff and her counsel to represent those individuals opting in to the collective action;

E. An Order awarding counsel for Plaintiff reasonable attorneys' fees and costs; and

F. Any further relief which the Court deems appropriate under the circumstances.

Dated ____ November, 2009

Respectfully submitted,

By: _____
Trevan Borum

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Case No. 2:09-cv-05782-MMB
Honorable Michael M. Baylson
(Filed via electronic Case Filing System)

LAURA SYMCZYK, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED
Plaintiff, Appellant,

v.

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORPORATION
Defendants, Appellees.

DEFENDANTS' ANSWER AND STATEMENT OF AFFIRMATIVE AND ADDITIONAL DEFENSES TO PLAINTIFF'S COMPLAINT

Defendant Genesis HealthCare Corporation and Defendant ElderCare Resources Corporation (collectively "Defendants"), by and through their undersigned counsel, hereby file this Answer and Statement of Affirmative and Additional Defenses to Plaintiffs Complaint ("Complaint"). Defendants respond to the correspondingly numbered paragraphs of the Complaint as follows:

1. Admitted in part; denied in part. Defendants admit that Plaintiff purports to proceed as set forth in Paragraph 1. Defendants deny that Plaintiff has any actionable claims or is entitled to any unpaid compensation. To the contrary, Defendants have fully

and properly compensated Plaintiff for all hours worked.

2. Denied. Because neither named Defendant is Plaintiff's employer under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*. (the "FLSA"), this Court lacks subject matter jurisdiction over Plaintiff's claim according to the express terms of Section 216(b) of the FLSA.

3. Denied as stated. Defendants admit that the allegations contained in Plaintiff's Complaint occurred in this District and that venue is therefore proper in this Court.

4. Denied as stated. Genesis HealthCare Corporation admits that, through various subsidiaries and affiliates, it offers a variety of healthcare services in more than 200 centers across 13 eastern states, Genesis HealthCare Corporation further states that it maintains its headquarters at 101 E. State Street, Kennett Square, Pennsylvania.

5. Denied.

6. Denied.

7. Denied.

8. Denied.

9. Denied.

10. Admitted in part; denied in part. Defendants admit that Plaintiff refers to Genesis Healthcare Corporation and Eldercare Resources Corporation jointly as Defendants in the Complaint but Defendants deny that they are in fact proper Defendants in this action as they did not employ Plaintiff.

11. Denied.

12. Admitted in part; denied in part. Defendants admit that Plaintiff is an adult and that from April 2007 to December 2007, she worked as a Registered Nurse at Pennypack Center. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation concerning where Plaintiff currently resides, and therefore denies that allegation. Defendants also deny any and all remaining allegations contained in Paragraph 12 of Plaintiff's Complaint.

13. Admitted in part; denied in part. Defendants admit that Plaintiff purports to proceed as set forth in Paragraph 13. Defendants deny, however, that such allegation is sufficient to comply with the requirements of Section 2160) of the FLSA.

14. Admitted in part; denied in part. Defendants admit that Plaintiff purports to proceed as set forth in Paragraph 14. Defendants deny, however, that this case is properly asserted as a collective action, that Plaintiff has a valid cause of action in any respect, that Plaintiff's claims are similar to claims of the alleged putative plaintiffs, or that Plaintiff is otherwise entitled to any relief.

15. Denied.

16. Denied.

17. Denied.

18. Denied.

19. Denied.

20. Denied.

21. Denied.

22. Denied.

23. Denied.

24. Denied.

25. Denied.

26. Denied.

27. Denied.

28. Denied.

29. Denied.

30. Denied.

31. Denied.

32. Denied.

33. Denied.

34. Admitted in part; denied in part. Defendants admit that the first sentence of Paragraph 34 reflects Plaintiff's belief. Defendants deny, however, that Plaintiff and/or any members of the putative collective group are entitled to any amounts. The second sentence in Paragraph 34 sets forth conclusions of law to which no responsive pleading is required and Defendants therefore deny those allegations,

35. Paragraph 35 of Plaintiff's Complaint is an incorporation paragraph. As a result, Defendants incorporate their prior responses to all preceding paragraphs by reference.

36. Admitted in part; denied in part. Defendants admit that Plaintiff purports to proceed as set forth in Paragraph 36. Defendants deny, however, that this case is properly asserted as a collective action pursuant to 29 U.S.C. § 216(b) as defined by Plaintiff in this paragraph or otherwise, that Plaintiff has a valid cause of action in any respect, that Plaintiff's claims

are similar to claims of the alleged putative plaintiffs, or that Plaintiff is otherwise entitled to any relief.

37. Admitted in part; denied in part. Defendants admit that Plaintiff is unable to state the exact number of putative class members because the class as defined is unascertainable. Regardless, Defendants deny that this case is properly asserted as a collective or class action as defined by Plaintiff in this paragraph or otherwise.

38. Denied.

a. Denied.

b. Denied.

c. Denied.

d. Denied.

e. Denied.

f. Denied.

g. Denied.

h. Denied.

i. Denied.

10.[1] Denied.

11. Denied.

12. Denied.

13. Denied.

14. Denied.

---

[1] In her Complaint, Plaintiff commences a now sequence of numbering paragraphs beginning with No. 10 on page 7. Defendants' Answer and Statement of Affirmative and Additional Defenses to Plaintiff's Complaint responds to those allegations following the same numerical sequencing.

15. Denied.

16. Denied.

17. Denied.

18. Denied.

19. Paragraph 19 of Plaintiff's Complaint is an incorporation paragraph. As a result, Defendants incorporate their prior responses to all preceding paragraphs by reference.

20. Denied.

21. Denied.

22. Denied.

23. Denied. By way of further response, neither named Defendant was Plaintiff's "employer" as the term is defined in the FLSA.

24. Denied.

25. Denied.

WHEREFORE, Defendants request judgment against Plaintiff:

1. Dismissing Plaintiff's Complaint on the merits and with prejudice;

2. Awarding Defendants their attorneys' foes, costs, and disbursements; and

3. Awarding such other relief as the Court deems just and equitable.

AFFIRMATIVE OD ADDITIONAL DEFENSES

1. To the extent the Court finds that Defendants took any actions or omissions with respect to Plaintiff, such acts or omissions concerning or affecting Plaintiff and the putative classes Plaintiff purports to

represent were undertaken in good faith to comply with the ELSA, and with reasonable grounds that the actions did not violate the FLSA, and were justified, proper, and lawful, and were taken without any intent to violate the FLSA.

2. To the extent Plaintiff's and/or putative class members' claims implicate the National Labor Relations Act and/or the Labor Management Relations Act, the doctrine of preemption bars Plaintiff's purported claims and the claims she seeks to assert on behalf of others.

3. To the extent Plaintiff seeks to enforce putative class members' rights under collective bargaining agreements to which she is not a party, Plaintiff lacks standing to pursue the purported claims in whole or in part. This defense may also apply to the purported claims of some or all of the potential members of the putative classes that Plaintiff purports to represent.

4. Plaintiff's purported claims and the claims she seeks to assert on behalf of others are barred in whole or in part by the doctrines of !aches, waiver, release, accord and satisfaction, and/or unclean hands.

5. Plaintiff's purported claims are barred in whole or in part by Plaintiff's failure to mitigate her alleged damages, insofar as Plaintiff failed to utilize internal complaint procedures available to her regarding the matters alleged in the Complaint. This defense may also apply to the purported claims of some or all of the potential members of the putative class that Plaintiff purports to represent.

6. To the extent that discovery reveals that Plaintiff falsely reported her hours and there is no evidence that Defendants required the false reporting of hours; and no evidence that Defendants knew or should have known that Plaintiff was providing false information as to her hours, or to the extent discovery reveals that Plaintiff otherwise failed to follow Defendants' policies for reporting her hours, the doctrine of estoppel bars the claims asserted by Plaintiff. This defense may also apply to the purported claims of some or all of the potential members of the putative class that Plaintiff purports to.

7. Plaintiff's purported claims and the claims she seeks to assert on behalf of others are barred in whole or in part by Section 10 of the Portal-to-Portal Act, 29 U.S.C. § 259, because any acts or omissions giving rise to this action were done in good faith and in reliance on written administrative regulations, orders, rulings, interpretations and approvals of the Department of Labor.

8. Plaintiff's purported claims and the claims she seeks to assert on behalf of others are barred in whole or in part by Section 11 of the Portal-to-Portal Act, 29 U.S.C. § 260, because any acts or omissions giving rise to this action were done in good faith and with reasonable grounds for believing that the actions or omissions were not a violation of the FLSA or any other state or federal law.

9. To the extent that the period of time alluded to in the Complaint, or the period of time alleged later in this action, predates the limitations period set forth in Section 6(a) of the Portal-to-Portal Act, 29 U.S.C. § 255(a), such claims are barred.

10. Plaintiff does not, and cannot, fairly and adequately represent the interests of the purported class.

11. Certification of a class, as applied to the facts and circumstances of this case, would constitute a denial of Defendants' procedural rights and right to trial by jury, and to substantive and procedural due process, in violation of the Fourteenth Amendment of the United States Constitution.

12. Plaintiff is not entitled to equitable relief insofar as she has an adequate remedy at law.

13. Plaintiff's claims are barred to the extent Plaintiff and/or alleged similarly situated employees did not work more than forty (40) hours in any given work week and, therefore, are not entitled to overtime under § 207 of the FLSA.

14. Plaintiff and all alleged putative class members have been paid and/or received all wages and/or compensation due to them by virtue of their employment with Defendants. Defendants reserve the right to assert any additional defenses they discover during the course of litigation.

WHEREFORE, Defendant Genesis HealthCare Corporation and Defendant ElderCare Resources Corporation request that this Court dismiss Plaintiff's Complaint with prejudice; that it enter judgment in Defendants' favor and against Plaintiff on all counts; and that this Court award Defendants their costs and attorneys' fees incurred in defending this action and such other relief as it deems appropriate.

Respectfully submitted,

/s/ *James N. Boudreau*
James N. Boudreau (PA 77891)
Michele Malloy (PA 88456)
Christina Tellado Winston (PA 204246)
LITTLER MENDELSON, P.C.
THREE PARKWAY
1601 Cherry Street, Suite 1400
Philadelphia, PA 19102.1321
Attorneys for Defendants
Genesis Healthcare Corporation and
Eldercare Resources Corporation

Date: February 18, 2010

CERTIFICATE OF SERVICE

I hereby certify that, on February 18, 2010, a true and correct copy of the foregoing **Defendants' Answer and Statement of Affirmative and Other Defenses to Plaintiff's Complaint** was filed and served *via CM/ECF* electronic filing, addressed to the following party:

Trevan P. Borum
Two Logan Square
100N. 1811 Street
12th Floor
Philadelphia, PA 19103
(215) 567.1248
Email: t.borum@verizon.net
(Via ECF Filing)

/s/ James N. Boudreau

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 09-5782

LAURA SYMCZYK

v.

GENESIS HEALTHCARE CORPORATION

ORDER

AND NOW, this 10 day of March, 2010, following an unrecorded Rule 16 pretrial conference with counsel on March 8, 2010, it is hereby ORDERED as follows:

1. The parties will have an initial ninety (90) day discovery period, at the close of which Plaintiff will move for conditional certification under § 216(b) of the FLSA.

2. Following the Court's ruling on the certification motion, the Court will allow an additional six (6) month discovery period, to commence at the close of any Court-ordered opt-in window.

3. If there is a conditional certification, and the Defendant intends to file for de-certification, the Court will set an appropriate schedule. In addition, if either party intends to file dispositive motions, the Court will set a schedule as well.

4. No trial pool date will be set at this time.

5. Magistrate Judge David Strawbridge will contact the parties for a settlement conference unless they advise the Court that they intend to proceed with a private mediator.

BY THE COURT:

s/ Michael M. Baylson
Michael M. Baylson, U.S.D.J.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Case No. 2:09-cv-05782-MMB
Honorable Michael M. Baybon
(Filed via Electronic Case Filing System)

LAURA SYMCZYK,
P'aintiff,

v.

GENESIS HEALTHCARE CORPORATION and ELDERCARE RESOURCES CORPORATION,
Defendants.

DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

Pursuant to Fed. R. Civ. P. 12(b)(1), Defendants Genesis HealthCare Corporation and ElderCare Resources Corporation (collectively "Defendants") hereby move for an order dismissing Plaintiff Laura Symczyk's ("Ms. Symczyk") Complaint in its entirety. As grounds for their Motion, Defendants state as follows:

1. On December 4, 2009, Ms. Symczyk filed this action, allegedly against her former employer(s), seeking unpaid wages, overtime wages, attorneys' fees and costs under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("FLSA"). (Compl. ¶ 38).

2. Shortly after the Complaint's filing, Defendants determined that because Ms. Symczyk worked for a subsidiary of Defendant Genesis HealthCare Corporation for such a short period of time, the

overall value of her claim is very small. Accordingly, on February 18, 2010, as provided in Fed. R. Civ. P. 68, Defendants extended an unequivocal Offer of Judgment ("the Offer") to Ms. Symczyk. That Offer provided her with complete relief for any and all of her alleged damages, fees, and costs (and then some).

3. Even though Defendants' Offer to Ms. Symczyk affords her all relief she seeks and could obtain in this matter, she never responded, effectively rejecting the Offer. *See* F. Civ. P. 68(a) (providing Ms. Symczyk fourteen (14) days to accept the Offer). Consequently, Ms. Symczyk no longer has a personal stake or legally cognizable interest in the outcome of this action, a prerequisite to this Court's subject matter jurisdiction under Article III of the United States Constitution.

WHEREFORE, for all the foregoing reasons, and those contained in Defendants' accompanying Memorandum, this Court should grant Defendants' Motion to Dismiss and dismiss Plaintiff's claims in their entirety and with prejudice.

Respectfully submitted,

/s/ James N. Boudreau
James N. Boudreau (PA 77891)
Michele Malloy (PA 88456)
Christina Tellado Winston (PA 204246)
LITTLER MENDELSON, P.C.
THREE PARKWAY
1601 Cherry Street, Suite 1400
Philadelphia, PA 19102.1321
Attorneys for Defendants
Genesis Healthcare Corporation and
ElderCare Resources Corporation

Date: March 23, 2010

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Case No. 2:09-cv-05782-MMB
Honorable Michael M. Baybon
(Filed via Electronic Case Filing System)

LAURA SYMCZYK,
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION and ELDERCARE RESOURCES CORPORATION,
Defendants.

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

On December 4, 2009, Plaintiff Laura Symczyk ("Ms. Symczyk") filed this action, allegedly against her former employer(s), seeking unpaid wages, overtime wages, attorneys' fees and costs under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("FLSA"). Shortly after the Complaint's filing, Defendant Genesis HealthCare Corporation and Defendant ElderCare Resources Corporation (collectively "Defendants") determined that because Ms. Symczyk worked for a subsidiary of Defendant Genesis HealthCare Corporation for such a short period of time, the overall value of her claim is very small. Accordingly, on February 18, 2010, in accordance with Fed. R. Civ. P. 68, Defendants extended an unequivocal Offer of Judgment ("the Offer") to Ms. Symczyk. That Offer provided her with complete

relief for any and all of her alleged damages, fees, and costs (and then some). Ms. Symczyk never responded, effectively rejecting the Offer. Consequently, Ms. Symczyk no longer has a personal stake or legally cognizable interest in the outcome of this action, a prerequisite to this Court's subject matter jurisdiction under Article III of the United States Constitution. As a result, this Court should dismiss her claims pursuant to Fed. R. Civ. P. 12(b)(1).

Defendants fully expect that Ms. Symczyk will argue against dismissal of her case because she has filed it not only on behalf of herself; but others allegedly similarly situated. The Complaint's collective action allegations, however, do not alter the fact that Ms. Symczyk remains the only plaintiff in this case, a case in which she now has no personal stake.[1] Indeed, the exceptions to the mootness doctrine generally applicable to Rule 23 opt-out class actions simply do not apply in purported collective actions under § 216(b). Accordingly, this Court is compelled to dismiss this Action, notwithstanding the Complaint's collective action allegations.

I. RELEVANT FACTS AND PROCEDURAL HISTORY

Ms. Symczyk worked as a Registered Nurse at the Pennypack Center from April 2007 to December 2007. (Compl. ¶ 12). On December 4, 2009, she filed this lawsuit alleging that Defendants violated the FLSA by failing to pay her wages and overtime for all

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[1] As this Court is well aware, under § 216(b) of the FLSA, individuals must affirmatively opt-in to the lawsuit by filing a consent form. Despite over four months since filing of the Complaint, none of Ms. Symczyk's former colleagues have availed themselves of this Court's jurisdiction.

hours worked. (Compl. ¶ 38). In her Complaint, she purports to bring a § 216(b) collective action on behalf of "all persons who, at any time during the past three years and up until the date of entry of judgment are or were employed by Defendants . . . and whose pay was subject to an automatic meal break deduction even when those persons performed compensable work during such unpaid `meal break.'" (Compl. ¶ 1). Ms. Symczyk has yet to move for court-authorized notice in this case.

On February 18, 2010, Defendants served Ms. Symczyk with a Rule 68 Offer of Judgment that provided complete relief for all of her alleged damages. (*See* Defs.' Rule 68 Offer of Judgment to Laura Symczyk, attached hereto as Exhibit A). Specifically, Defendants' Offer to Ms. Symczyk provided a gross payment of $7,500.00 for all wages, benefits, and other monetary damages allegedly owed to her, including liquidated damages under the FLSA. *See* Exhibit A. in addition, Defendants' Offer included reasonable attorneys' fees, costs and expenses incurred by Ms. Symczyk in bringing her claims, as determined by this Court. *Id* Defendants formulated their Offer to ensure that they offered Ms. Symczyk relief in excess of what she could potentially recover if ultimately successful on her claims.[2] Even though

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[2] In calculating the offer amount, and solely for that purpose, Defendants made every assumption in Ms. Symczyk's favor, including, among other things, that: (1) Ms. Symczyk worked at the Pennypack Center from April 2007 through December 2007 (the "Alleged Damages Period"); (2) during the Alleged Damages Period, Ms. Symczyk was paid $30.00 per hour for regular time and $45.00 per hour for overtime hours; (3) Defendants assumed that Ms. Symczyk worked and was not compensated for 30 minutes each workday during the Alleged Damages Period; and (4) Defendants gave her credit for full (double) liquidated

Defendants' Offer to Ms. Symczyk afforded her all relief she could obtain in this matter, she never responded to the Offer.[3]

II. MS. SYMCZYK CANNOT ESTABLISH SUBJECT-MATTER JURISDICTION

A. There is No Pending Case or Controversy Before this Court.

Article III of the United States Constitution limits the jurisdiction of federal courts to "actual cases and controversies." U.S. Const. Art. III Sec. 2; *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968). "No justiciable controversy is presented . . . when the question sought to be adjudicated has been mooted by subsequent developments." *Flast*, 392 U.S. at 95. As the United States Supreme Court recognizes, a defendant's offer to pay the full amount of the plaintiffs potential recovery is such a subsequent development that renders the plaintiff's claim moot because she loses a legally cognizable interest in the outcome of the litigation. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000); *Lake Coal Co., Inc. v. Roberts & Schaefer Co.*, 474 U.S. 120 (1985) (vacating judgment of lower court and remanding with instructions to dismiss case as moot when there was a "complete settlement of the underlying causes of action"). Thus,

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damages under the FLSA. Within these parameters and based on Ms. Symczyk's time records, Defendants calculated her maximum possible recovery in this litigation to be: 68 overtime hours at $45.00 an hour $3060.00 and 13 regular hours at $30.00 an hour = $390.00 for a total of $3,450.00. This amount doubled (liquidated damages under the FLSA) is $6,900.00. Exhibit A.

[3] Ms. Symczyk had fourteen (14) days to accept Defendants' Offer. *See* F. FL Civ. P. 68(a).

once a defendant makes such an offer, the district court loses subject-matter jurisdiction over the plaintiffs case. *See Brown v. Phila. Hous. Auth.*, 350 F.3d 338, 343 (3d Cir. 2003) (stating that "[Allen claims of the named plaintiffs become moot before class certification, dismissal of the action is required.") (quoting *Lusardi v. Xerox Corp.*, 975 F.2d 964, 974 (3d Cir. 1992)).

Where, as here, a defendant offers all that a plaintiff could hope to recover through litigation, the plaintiff loses her personal stake in the litigation and the issues in the action are no longer considered live. *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991) (explaining that "[o]nce the defendant offers to satisfy the plaintiffs entire demand, there is no dispute over which to litigate and a plaintiff who refuses to acknowledge this loses outright, under *Fed. R. Civ. P. 12(b)(1)*, because he has no remaining stake.") (internal citation omitted); *see also* 13A Charles Alan Wright & Arthur R. Miller, Fed. Practice and Procedure: Jurisdiction 2d § 3533.2, at 236 (2d ed. 1984) ("Even when one party wishes to persist to judgment, an offer to accord all of the relief demanded may moot the case.").

It is well settled that the mootness doctrine applies with equal force to FLSA collective action overtime cases where defendants have offered the named plaintiff the full relief sought (even if rejected) and no other parties have opted in to the action. *See, e.g., Louisdor v. Am. Telecomms., Inc.*, 540 F. Supp. 2d 368, 373-74 (E.D.N.Y. 2008) (finding that a Rule 68 Offer of Judgment mooted plaintiff's FLSA claims); *Darboe v. Goodwill Indusits, of Greater N.Y., & Northern NJ, Inc.*, 485 F. Supp. 2d 221 (E.D.N.Y. 2007) (same); *Ward v. Bank of N.Y.*, 455 F. Supp. 2d

262, 267 (S.D.N.Y. 2006) (granting motion to dismiss FLSA claims as moot because defendant's Rule 68 offer provided more than plaintiff could recover at trial); *Vogel v. Am. Kiosk Mgmt.*, 371 F. Supp. 2d 122, 128 (D. Conn. 2005) (holding offer of judgment exceeding plaintiffs potential recovery mooted individual claims under the ELSA even though he did not accept the offer); *Mackenzie v. Kindred Hospitals East, L.L.C.*, 276 F. Supp. 2c1 1211, 1219 (M.D. Fla. 2003) (concluding offer of judgment in excess of amount plaintiff could recover in FLSA suit mooted case); *Holcomb v. Mortgage House, Inc.*, C.A. No. 6:06-cv-45-Orl-22DAB, 2007 U.S. Dist. LEXIS 6132 (M.D. Fla. Jan. 13, 2007) (finding FLSA claim mooted by offer of judgment in full amount of potential recovery); *Thomas v. Interland, Inc.*, C.A. No. 1:02-cv3175-CC, 2003 U.S. Dist. LEXIS 27664 (N.D. Ga. Aug. 25, 2003) (dismissing wage and overtime claims as moot). In those circumstances where an Offer of Judgment is made to the only participating plaintiff(s), subject matter jurisdiction ceases to exist and the case is properly dismissed because "'there is no justification for taking the time of the court and the defendant in the pursuit of [a] minuscule individual claim[which defendant has . . . satisfied.'" *Ambalu v. Rosenblatt*, 194 F.R.D. 451, 453 (E.D.N.Y. 2000) (citation omitted) (alteration in original); *see also Briggs v. Arthur T. Mott Real Estate, LLC*, CA No. 06-0648, 2006 U.S. Dist. LEXIS 82891, at * 2 (E.D.N.Y. Nov. 14, 2006) (recognizing that when case lacks legally cognizable interest, court must dismiss it for lack of subject matter jurisdiction).

Here, Defendants' Offer to Ms. Symczyk provides her with compensation that is equal to or greater than the potential relief she could obtain at trial. Specifically, Defendants calculated the Offer

overwhelmingly in Ms. Symczyk's favor, including amounts that she may not even be eligible to recover in this matter.[4] As a result, Ms. Symczyk lacks a legally cognizable personal stake in the outcome of this case and there is no case or controversy before this Court. The Court, therefore, should dismiss this Action with prejudice under Fed. R. Civ. P. 12(b)(1).

B. Ms. Symczyk Cannot Revive a Moot Claim by Claiming to Represent a Purported "Opt-in" Class under the FLSA.

Ms. Symczyk's complaint remains subject to dismissal even though Ms. Symczyk and her counsel allege that this case is an opt-in collective action under § 216(b). This is because Ms. Symczyk cannot create a "case or controversy" simply by alleging that she represents a group of potential plaintiffs. To the contrary, courts confronted with solitary individuals, claiming to represent a collection of plaintiffs under the FLSA, routinely dismiss the actions when those individuals are presented with an offer of judgment that meets or exceeds their possible demands. *See, e.g., Louisdo*, 540 F. Supp. 2d 368, 373-74 (E.D.N.Y. 2008); *Vogel*, 371 F. Supp. 2d 122, 128 (D. Conn.

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[4] Under the FLSA, an individual who has not been paid the minimum wage is entitled to recoup the amount of underpayment and, if the underpayment did not result from the good faith conduct of the employer, an equal amount in liquidated damages. *See* 29 U.S.C. § 216(b). Notwithstanding that general proposition, § 260 of the FLSA provides employers with an affirmative defense to liquidated damages in the event that they acted in good faith, but are nevertheless found to have engaged in a technical violation of the ELSA. Defendants dispute that Ms. Symczyk is entitled to liquidated damages. Solely in an effort to be overly inclusive, however, Defendants included in their Offer of Judgment an amount of liquidated damages.

2005); *Mackenzie*, 276 F. Supp. 2d 1211, 1219 (M.D. Fla. 2003); *Thomas*, C.A. No. 1:02-cv-3175-CC, 2003 U.S. Dist. LEXIS 27664 (N.D. Ga. Aug. 25, 2003. In other words, courts consistently reject jurisdiction over claimed FLSA collective actions where there are no class members other than the "lead plaintiff," and when the defendants satisfies that plaintiff's demand by an offer of judgment. *See id.*

The framework of the FLSA demonstrates precisely why dismissal is appropriate in circumstances such as here, where the only participating plaintiff is offered full relief. The opt-in procedure under § 216(b) is fundamentally different from the opt-out procedure in Rule 23 class actions. The plain language of the FLSA and its legislative history make it clear that plaintiffs in § 216(b) cases have no procedural right, independent of their claims, in a collective action.[5] Specifically, Congress enacted § 216(b) with the intent to ban representative actions. Consequently, the very nature of the FLSA's § 216(b) opt-in procedure is distinctly different from the opt-out procedures in a Rule 23 class action case.[6]

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[5] As enacted the FLSA allowed employees and others, such as unions to sue in a representative capacity on behalf of unidentified employees. Under 216(b), Congress amended the Act to expressly bar such representative actions on behalf of absent employees. It requires employees who seek to join an FLSA suit to affirmatively opt in by filing a written notice of consent of Court. 29 U.S.C. § 216(b).

[6] Employees have a congressionally created, substantive right under § 216(b) not to have their FLSA claims adjudicated unless they expressly and affirmatively consent to do so. Employers, in turn, have a substantive right to be free from representative actions, thus ensuring that they will only be liable for alleged FLSA violations if an employee affirmatively and expressly asserts such a claim. When an employee pursues a class claim

In *Cameron-Grant v. Maxim Health Care Svcs., Inc.*, the Eleventh Circuit analyzed the specific issue currently before this Court and concluded that "a § 216(b) plaintiff. . . . presents only a claim on the merits. In contrast to the Rule 23 plaintiff; a § 216(b) plaintiff has no claim that he is entitled to represent other plaintiffs. Accordingly, because plaintiff has no remaining personal claims, this action is moot." 347 F.3d 1240, 1249 (11th Cir. 2003). Here, Defendants have offered Plaintiff almost twice what she could recover at trial, plus her reasonable attorneys' fees. This Court should follow the great weight of authority and hold that Defendants' Offer moots Ms. Symczyk's claim, and dismiss the Complaint with prejudice.

III. CONCLUSION

Defendants' Rule 68 Offer of Judgment affording Ms. Symczyk complete relief for her claims mooted this case. As a result, this Court no longer has subject-matter jurisdiction over it.

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under a Rule 23 opt-out action it acts to affect the rights of all putative class members unless and until they choose to opt out of the action. Specifically, upon a final adjudication of the Rule 23 opt-out class, *res judicata* will bar absent class members who do not opt out of the class from pursuing those claims in the future. Whereas, final adjudication of a § 216(b) action affects only those employees who affirmatively opted in to the litigation. Because no other employees have opted in to this action, this remains a single plaintiff case affecting only Ms. Symczyk's rights.

Respectfully submitted,

/s/ James N. Boudreau
James N. Boudreau (PA 77891)
Michele Malloy (PA 88456)
Christina Tellado Winston (PA 204246)
LITTLER MENDELSON, P.C.
THREE PARKWAY
1601 Cherry Street, Suite 1400
Philadelphia, PA 19102.1321
Attorneys for Defendants

Date: March 23, 2010

CERTIFICATE OF SERVICE

I hereby certify that, on March 23, 2010, a true and correct copy of the foregoing **Defendants' Motion to Dismiss for Lack of Subject-Matter Jurisdiction and Supporting Memorandum** was filed and served *via CM/ECF* electronic filing, addressed to the following party:

Trevan P. Borum
Two Logan Square
100 N. 18th Street 12th Floor
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(215) 567.1248
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(Via ECF Filing)

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Gerald Wells, III
Faruqi & Faruqi LLP
2600 Philmont Avenue
Suite 324
Huntingdon Valley, PA 19006
Email: jwells@faruqilaw.com
(Via email)

/s/ James N. Boudreau

EXHIBIT A

Littler

Littler Mendelson, P.C.
Three Parkway
1601 Cherry Street, Suite 1400
Philadelphia, PA 19102.1321

February 18, 2010

James N. Boudreau
267.402.3029 direct
267.402.3000 main
267.402.3131 fax
jboudreau@littler.com

VIA HAND-DELIVERY AND ELECTRONIC MAIL

Gerald Wells, III
Faruqi Faruqi LLP
2600 Philmont Avenue
Suite 324
Huntingdon Valley, PA 19006

Re: Laura Symczyk v. Genesis HealthCare Corp., C.A. 09-cv-05782 MMB

Dear Jerry:

Pursuant to Federal Rule of Civil Procedure 68, I enclose an Offer of Judgment from Genesis Health-Care Corporation (*Genesis') to Plaintiff Laura Symczyk for all claims she asserts in the above referenced matter. This Offer of Judgment includes (I) the aggregate amount of $7,500 inclusive of all damages, liquidated damages, and interest plus (II) such reasonable attorneys' fees, costs, and expenses to which Plaintiff is entitled by law, as the Court may determine.

This amount exceeds any amount that Plaintiff could recover in this case and is based on several significant assumptions in her favor. Genesis has

made these assumptions solely for purposes of this Offer of Judgment and they would not be available to Plaintiff if this matter continues in litigation. Defendant's methodology is as follows:

Plaintiff contends that Genesis failed to pay her for time spent working through her meal breaks due to the alleged automatic deduction of meal breaks and is thus owed overtime pay and other related relief under the Fair Labor Standards Act ("FLSA"). Genesis denies these claims.

> Plaintiff worked at the Pennypack Center from April 2007 through December 2007 (the "Alleged Damages Period").
>
> During the Alleged Damages Period, Plaintiff was paid $30.00 per hour for regular time and $45.00 per hour for overtime hours.
>
> We assumed that Plaintiff worked and was not compensated for 30 minutes each workday during the Alleged Damages Period. A copy of Plaintiff's actual time records are enclosed.
>
> We also gave Plaintiff credit for full (double) liquidated damages under the FLSA.

Within these parameters and based on Plaintiff's time records, we calculated Plaintiff's maximum possible recovery in this litigation to be:

68 overtime hours at $45.00 an hour = $3060.00

13 regular hours at $30.00 an hour = $390.00

Total = $3,450.00

$3,450 x 2 (liquidated damages) = total alleged damages under the FLSA $6,900.00.[1]

---

[1] Note that this Offer presumes application of the FLSA's three year statute of limitations for alleged willful violations

Genesis offers Plaintiff $7,500.00 in alleged unpaid wages, plus attorneys' fees, costs and expenses as determined by the Court.

In accordance with Federal Rule of Civil Procedure 68, if Plaintiff has not accepted this Offer of Judgment in writing within ten (10) days after service, this Offer of Judgment shall be deemed withdrawn and no further action will be required by Genesis. Please note that, also in accordance with Rule 68, if Plaintiff obtains a final judgment in this matter that is less favorable than this Offer, Genesis will seek to recover all reasonable costs (potentially defined to include fees under the FLSA) incurred after it made this Offer.

On behalf of Genesis, therefore, we urge Plaintiff to accept this Offer of Judgment by this deadline.

Sincerely,

James N. Boudreau
James N. Boudreau
JNB/CW

(which Genesis contends does not apply). In the event the Court applied the FLSA's two year statute of limitations for non-willful violations, Plaintiff's maximum recover is virtually zero. In addition, there is no obligation under the FLSA to pay straight time wages allegedly due and owing, and certainly no obligation to liquidate them. To encourage Plaintiff's acceptance of this Offer, however, Genesis has elected to include such alleged damages in its Offer.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed: 03/23/10]

Case No. 2:09-cv-05782-MMB

LAURA SYMCZYK,

Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION, *et al*,

Defendants.

Honorable Michael M. Baylson

DEFENDANTS' OFFER OF JUDGMENT

TO PLAINTIFF LAURA SYMCZYK:

PLEASE TAKE NOTICE that Defendants Genesis HealthCare Corp, and ElderCare Resources Corporation hereby offer to allow entry of judgment under Rule 68 of the Federal Rules of Civil Procedure as follows:

Judgment in favor of Plaintiff against Defendants on Plaintiff's Complaint and all causes of action alleged therein in the total sum of seven thousand, five hundred dollars ($7,500.00), exclusive of attorneys' fees and costs accrued to date. This amount represents the total amount Defendants shall be obligated to pay on account of any liability claimed herein.

This Offer of Judgment is made for the purposes specified in Rule 68 and is not to be construed as an admission that Defendants are liable in this action or that Plaintiff has suffered any damage. If Plaintiff fails to obtain a more favorable judgment against Defendants, please take notice that pursuant to Rule 68(d), Defendants will ask the Court to deny Plaintiff any post-offer costs, including attorneys' fees, and for an award of Defendants' post-offer costs, including but not limited to, their attorneys' fees, a sum to cover costs of the services of experts in preparation for trial, costs incurred during trial, and such other costs and fees as the Court deems proper, in addition to any other rights and remedies available under the law.

This Offer will remain open until it expires by operation of law, unless otherwise withdrawn by Defendants. Evidence of this Offer is not admissible except in a proceeding to determine costs and/or fees.

James N. Boudreau
James N. Boudreau
Michele H. Malloy
Christina Tellado-Winston
LITTLER MENDELSON, P.C.
Three Parkway
1601 Cherry Street, Suite 1400
Philadelphia, PA 19102.1321

Attorneys for Defendants
Genesis HealthCare Corp. and
Eldercare Resources

Dated: February 18, 2010

CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below I caused a copy of the foregoing *Defendants' Offer of Judgment* to be served upon the following counsel of record by the methods indicated below:

VIA Hand Delivery:

Gerald Wells, Esquire
Faruqi & Faruqi
2600 Philmont Avenue
Suite 324
Huntingdon Valley, PA 19006

Counsel for Plaintiff

/s/ James N. Boudreau
James N. Boudreau

Dated: February 18, 2010

EMPLID	LAST NAME	FIRST NAME	APPLY DATE	PAY CODE	HOURS	WAGE AMT
80221932	Symczyk	Laura	Monday, April 30, 2007	Orientation NP	5.00	$150.00
80221932	Symczyk	Laura	Tuesday, May 01, 2007	Orientation NP	8.28	$248.50
80221932	Symczyk	Laura	Wednesday, May 02, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Thursday, May 03, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Friday, May 04, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Monday, May 07, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, May 08, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, May 09, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Thursday, May 10, 2007	Training	8.00	$240.00
80221932	Symczyk	Laura	Monday, May 14, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, May 15, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, May 16, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Thursday, May 17, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Friday, May 18, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Monday, May 21, 2007	Orientation NP	8.33	$250.00
80221932	Symczyk	Laura	Tuesday, May 22, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, May 23, 2007	Orientation NP	8.00	$240.00
80221932	Symczyk	Laura	Thursday, May 24, 2007	Orientation NP	6.67	$200.00
80221932	Symczyk	Laura	Thursday, May 24, 2007	Overtime	1.33	$60.00
80221932	Symczyk	Laura	Friday, May 25, 2007	Overtime	8.00	$360.00
80221932	Symczyk	Laura	Friday, May 25, 2007	Training	9.00	$270.00
80221932	Symczyk	Laura	Monday, May 28, 2007	Holiday	8.00	$240.00
80221932	Symczyk	Laura	Monday, May 28, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, May 29, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, May 30, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, May 31, 2007	Regular	8.28	$248.50
80221932	Symczyk	Laura	Saturday, June 02, 2007	Overtime	0.28	$12.75
80221932	Symczyk	Laura	Saturday, June 02, 2007	Regular	7.72	$231.50
80221932	Symczyk	Laura	Sunday, June 03, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, June 05, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, June 06, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, June 07, 2007	Regular	8.17	$245.00
80221932	Symczyk	Laura	Friday, June 08, 2007	Overtime	0.17	$7.50
80221932	Symczyk	Laura	Friday, June 08, 2007	Regular	7.83	$235.00
80221932	Symczyk	Laura	Monday, June 11, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, June 12, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, June 13, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, June 14, 2007	Regular	8.17	$245.00
80221932	Symczyk	Laura	Saturday, June 16, 2007	Overtime	0.17	$7.50
80221932	Symczyk	Laura	Saturday, June 16, 2007	Regular	7.83	$235.00
80221932	Symczyk	Laura	Sunday, June 17, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, June 18, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, June 20, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, June 21, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, June 22, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, June 25, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, June 26, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, June 28, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, June 29, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, June 30, 2007	Regular	8.00	$240.00

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EMPLID	LAST NAME	FIRST NAME	APPLY DATE	PAY CODE	HOURS	WAGE AMT
80221932	Synczyk	Laura	Sunday, July 01, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Tuesday, July 03, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Wednesday, July 04, 2007	Holiday	8.00	$240.00
80221932	Synczyk	Laura	Wednesday, July 04, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Thursday, July 05, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Friday, July 06, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Monday, July 09, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Tuesday, July 10, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Wednesday, July 11, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Thursday, July 12, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Saturday, July 14, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Sunday, July 15, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Tuesday, July 17, 2007	Regular	8.28	$248.50
80221932	Synczyk	Laura	Wednesday, July 18, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Thursday, July 19, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Friday, July 20, 2007	Overtime	0.28	$12.75
80221932	Synczyk	Laura	Friday, July 20, 2007	Regular	7.72	$231.50
80221932	Synczyk	Laura	Monday, July 23, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Tuesday, July 24, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Wednesday, July 25, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Thursday, July 26, 2007	Regular	9.00	$270.00
80221932	Synczyk	Laura	Saturday, July 28, 2007	Overtime	1.00	$45.00
80221932	Synczyk	Laura	Saturday, July 28, 2007	Regular	7.00	$210.00
80221932	Synczyk	Laura	Sunday, July 29, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Monday, July 30, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Wednesday, August 01, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Thursday, August 02, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Friday, August 03, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Monday, August 06, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Tuesday, August 07, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Wednesday, August 08, 2007	Hourly Sick	8.00	$240.00
80221932	Synczyk	Laura	Thursday, August 09, 2007	Hourly Sick	8.00	$240.00
80221932	Synczyk	Laura	Saturday, August 11, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Sunday, August 12, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Tuesday, August 14, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Wednesday, August 15, 2007	Hourly Personal	8.00	$240.00
80221932	Synczyk	Laura	Thursday, August 16, 2007	Hourly Personal	8.00	$240.00
80221932	Synczyk	Laura	Friday, August 17, 2007	Hourly Vacation	8.00	$240.00
80221932	Synczyk	Laura	Monday, August 20, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Tuesday, August 21, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Wednesday, August 22, 2007	Regular	8.57	$257.00
80221932	Synczyk	Laura	Thursday, August 23, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Saturday, August 25, 2007	Overtime	0.57	$25.50
80221932	Synczyk	Laura	Saturday, August 25, 2007	Regular	7.43	$223.50
80221932	Synczyk	Laura	Sunday, August 26, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Monday, August 27, 2007	Regular	8.17	$245.00
80221932	Synczyk	Laura	Tuesday, August 28, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Thursday, August 30, 2007	Regular	8.00	$240.00
80221932	Synczyk	Laura	Friday, August 31, 2007	Overtime	0.17	$7.50
80221932	Synczyk	Laura	Friday, August 31, 2007	Regular	7.83	$235.00

EMPLID	LAST NAME	FIRST NAME	APPLY DATE	PAY CODE	HOURS	WAGE AMT
80221932	Symczyk	Laura	Monday, September 03, 2007	Holiday	8.00	$240.00
80221932	Symczyk	Laura	Monday, September 03, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, September 04, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, September 05, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, September 06, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, September 08, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Sunday, September 09, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, September 11, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, September 12, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, September 13, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, September 14, 2007	Overtime	0.47	$21.00
80221932	Symczyk	Laura	Friday, September 14, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, September 17, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, September 18, 2007	Regular	8.83	$265.00
80221932	Symczyk	Laura	Wednesday, September 19, 2007	Regular	8.17	$245.00
80221932	Symczyk	Laura	Thursday, September 20, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, September 22, 2007	Overtime	1.00	$45.00
80221932	Symczyk	Laura	Saturday, September 22, 2007	Regular	7.00	$210.00
80221932	Symczyk	Laura	Sunday, September 23, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, September 24, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, September 26, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, September 27, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, September 28, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, October 01, 2007	Regular	8.32	$249.60
80221932	Symczyk	Laura	Tuesday, October 02, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, October 03, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, October 04, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, October 06, 2007	Overtime	0.32	$14.28
80221932	Symczyk	Laura	Saturday, October 06, 2007	Regular	7.68	$230.50
80221932	Symczyk	Laura	Sunday, October 07, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, October 09, 2007	Regular	8.15	$244.50
80221932	Symczyk	Laura	Wednesday, October 10, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, October 11, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, October 12, 2007	Overtime	0.15	$6.75
80221932	Symczyk	Laura	Friday, October 12, 2007	Regular	7.85	$236.50
80221932	Symczyk	Laura	Monday, October 15, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, October 16, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, October 17, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, October 19, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, October 20, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Sunday, October 21, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, October 22, 2007	Hourly Sick	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, October 24, 2007	Hourly Sick	7.12	$213.60
80221932	Symczyk	Laura	Thursday, October 25, 2007	Hourly Vacation	8.00	$240.00
80221932	Symczyk	Laura	Friday, October 26, 2007	Hourly Vacation	8.00	$240.00
80221932	Symczyk	Laura	Monday, October 29, 2007	Regular	8.75	$262.50
80221932	Symczyk	Laura	Tuesday, October 30, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, October 31, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, November 01, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, November 03, 2007	Overtime	0.75	$33.75

EMPLID	LAST NAME	FIRST NAME	APPLY DATE	PAY CODE	HOURS	WAGE AMT
80221932	Symczyk	Laura	Saturday, November 03, 2007	Regular	7.25	$217.50
80221932	Symczyk	Laura	Sunday, November 04, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, November 06, 2007	Regular	8.25	$247.50
80221932	Symczyk	Laura	Wednesday, November 07, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, November 08, 2007	Hourly Vacation	8.00	$240.00
80221932	Symczyk	Laura	Friday, November 09, 2007	Hourly Vacation	8.00	$240.00
80221932	Symczyk	Laura	Monday, November 12, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, November 13, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, November 14, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, November 15, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, November 17, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Sunday, November 18, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, November 20, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, November 21, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, November 22, 2007	Holiday	8.00	$240.00
80221932	Symczyk	Laura	Thursday, November 22, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, November 23, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, November 26, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, November 27, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, November 28, 2007	Regular	8.13	$244.00
80221932	Symczyk	Laura	Thursday, November 29, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, December 01, 2007	Overtime	7.70	$346.50
80221932	Symczyk	Laura	Saturday, December 01, 2007	Regular	7.87	$236.00
80221932	Symczyk	Laura	Tuesday, December 04, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, December 05, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, December 06, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, December 07, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, December 10, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, December 11, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Wednesday, December 12, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Friday, December 14, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, December 15, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Sunday, December 16, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, December 18, 2007	Regular	8.75	$262.50
80221932	Symczyk	Laura	Wednesday, December 19, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, December 20, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Monday, December 24, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, December 25, 2007	Holiday	8.00	$240.00
80221932	Symczyk	Laura	Tuesday, December 25, 2007	Regular	7.85	$235.50
80221932	Symczyk	Laura	Wednesday, December 26, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Thursday, December 27, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Saturday, December 29, 2007	Regular	8.00	$240.00
80221932	Symczyk	Laura	Sunday, December 30, 2007	Regular	8.00	$240.00

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed: 03/23/10]

Case No 2:09-cv-05782-MMB

LAURA SYMCZYK,
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION and ELDERCARE RESOURCES CORPORATION,
Defendants.

ORDER

AND NOW, this _____ day of _____ 2010, upon consideration of the Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, it is hereby ORDERED that Motion is GRANTED and Plaintiff's Complaint is DISMISSED with prejudice in its entirety.

BY THE COURT:

_____

J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed: 04/13/10]

CIVIL ACTION
NO. 09-5782

LAURA SYMCZYK,

v.

GENESIS HEALTHCARE CORPORATION, *et al.*

CIVIL ACTION
NO. 10-1378

LAURA SYMCZYK,

v.

GENESIS HEALTHCARE CORPORATION, *et al.*

STIPULATED ORDER

Counsel for the parties in the above-referenced civil actions conferred on April 9, 2009, and jointly request that the Court enter a Stipulated Order as follows:

1. On or before April 22, 2010, Plaintiff Laura Symczyk will voluntarily dismiss her Complaint titled *Laura Symczyk v. Genesis HealthCare Corporation, et al.*, Civil Action No. 10-1378. This dismissal will be without prejudice.

2. On or before April 22, 2010, Plaintiff Laura Symczyk will amend her Complaint titled *Laura Symczyk v. Genesis HealthCare Corporation, et al.*, Civil Action No. 09-5782 to include, *inter alia*, those state law claims asserted in the Complaint docketed at 10-1378.

3. Defendants will answer, move, or otherwise plead to the Amended Complaint within 20 days of the filing of the Amended Complaint.

4. The filing of the Amended Complaint will not moot or otherwise affect the Court's consideration or determination of Defendant's pending Motion to Dismiss (D.E. #12).

Respectfully submitted,

/s/ Trevan P. Borum
Trevan P. Borum
Two Logan Square
100 N. 18th Street
12th Floor
Philadelphia, PA
19103

Attorneys for
Plaintiff Laura
Symczyk

/s/ James N. Boudreau
James N. Boudreau (PA 77891)
Michele Malloy (PA 88456)
Christina Tellado Winston
(PA 204246)
LITTLER MENDELSON, P.C.
THREE PARKWAY
1601 Cherry Street, Suite 1400
Philadelphia, PA 19102.1321

Attorneys for Defendants
Genesis Healthcare
Corporation and Eldercare
Resources Corporation

SO ORDERED this ____ day of April 2010

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed: 04/15/10]

CIVIL ACTION
NO. 09-5782

LAURA SYMCZYK,

v.

GENESIS HEALTHCARE CORPORATION, *et al.*

CIVIL ACTION
NO. 10-1378

LAURA SYMCZYK,

v.

GENESIS HEALTHCARE CORPORATION, *et al.*

STIPULATED ORDER

Counsel for the parties in the above-referenced civil actions conferred on April 9, 2009, and jointly request that the Court enter a Stipulated Order as follows:

1. On or before April 22, 2010, Plaintiff Laura Symczyk will voluntarily dismiss her Complaint titled *Laura Symczyk v. Genesis HealthCare Corporation, et al.*, Civil Action No. 10-1378. This dismissal will be without prejudice.

2. On or before April 22, 2010, Plaintiff Laura Symczyk will amend her Complaint titled *Laura Symczyk v. Genesis HealthCare Corporation, et al.*,

Civil Action No. 09-5782 to include, *inter alia*, those state law claims asserted in the Complaint docketed at 10-1378.

3. Defendants will answer, move, or otherwise plead to the Amended Complaint within 20 days of the filing of the Amended Complaint.

4. The filing of the Amended Complaint will not moot or otherwise affect the Court's consideration or determination of Defendant's pending Motion to Dismiss (D.E. #12).

Respectfully submitted,

/s/ Trevan P. Borum
Trevan P. Borum
Two Logan Square
100 N. 18th Street
12th Floor
Philadelphia, PA
19103

Attorneys for Plaintiff Laura Symczyk

/s/ James N. Boudreau
James N. Boudreau (PA 77891)
Michele Malloy (PA 88456)
Christina Tellado Winston (PA 204246)
LITTLER MENDELSON, P.C.
THREE PARKWAY
1601 Cherry Street, Suite 1400
Philadelphia, PA 19102.1321

Attorneys for Defendants Genesis Healthcare Corporation and Eldercare Resources Corporation

SO ORDERED this 15th day of April 2010

/s/ Michael M. Baylson, U.S.D.J.
Michael M. Baylson, U.S.D.J.

Fax

Cc: Boudreau, Zystra > (mail), Wells, Carlson, Lynch, Malloy, Tellado, Borun (mail)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed: 04/16/10]

Case No.: 2:09-cv-05782-MMB

LAURA SYMCZYK, an individual, on behalf of herself and others similarly situated,
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION and ELDERCARE RESOURCES CORPORATION,
Defendants.

Honorable Michael M. Baylson

(Filed via Electronic Case Filing System)

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

This case is being brought as a collective action under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq*. ("FLSA"). Although this Court, on March 10, 2010, issued a scheduling order providing Plaintiff with ninety days to conduct discovery and file a motion for conditional certification pursuant to Section 216(b) of the FLSA, Defendants, having offered Plaintiff judgment on her individual claim pursuant to Fed. R. Civ. P. 68, now seek dismissal of this action in its entirety, claiming that there is no remaining "case or controversy." Defendants' strate-

gic attempt to "pick-off" the Plaintiff before the Court can meaningfully consider and decide the Section 216(b) motion represents a tactic which is heavily disfavored by the courts and that has been routinely rejected. Indeed, following guidance by the Supreme Court, the Third Circuit, in a virtually identical case involving Fed. it Civ. P. 23, has adopted a "relation back" doctrine, whereby the certification decision can be said to "relate back" to the filing of the complaint, thereby enabling the plaintiff to retain standing to litigate class certification even though his or her individual claim is arguably mooted by an offer of judgment. Plaintiff respectfully suggests that there is no ground for distinction of the Third Circuit's decision adopting the "relation back" doctrine simply because this case involves collective certification under Section 216(b) of the FLSA rather than class certification under Fed. R. Civ. P. 23. Accordingly, based upon the controlling precedent of the Third Circuit, as well as the highly persuasive decisions issued by several other courts addressing the issue in the precise context of the FLSA, Plaintiff respectfully requests that Defendants' motion be denied.

I. PROCEDURAL AND FACTUAL BACKGROUND

On December 4, 2009, Plaintiff filed her Collective Action Complaint alleging Defendants violated the FLSA by implementing an automatic meal break deduction policy, pursuant to which thirty minutes is automatically deducted from each employees' work time every shift, regardless of whether such employee actually receives an uninterrupted meal break. On February 18, 2010, Defendants filed an Answer to Plaintiff's Complaint. On that same day, Defendants served a Fed.R.Civ.P. 68 Offer of Judgment on Plaintiff. Plaintiff did not respond to that offer.

On March 8, 2010, this Court held a Fed.R.Civ.P. 16 Pretrial Telephone Conference with the Parties' Counsel. Following that conference, on March 10, 2010, this Court entered a scheduling order. (See Docket No. 10). Pursuant to that order, the Parties will have an initial ninety (90) day discovery period, at the close of which Plaintiff shall move for conditional certification under Section 216(b) of the FLSA. Following this Court's ruling on Plaintiff's certification motion, the Parties will have an additional six (6) month discovery period, which will begin at the close of any Court-ordered opt-in window.

Thereafter, Defendants filed the present motion to dismiss on March 23, 2010, claiming that Plaintiff's claim has been mooted by her failure to accept the offer of judgment.

II. RULE 12(b) STANDARD

Federal Rule of Civil Procedure 12(b)(1) provides that a court may dismiss a complaint for "lack of subject-matter jurisdiction." Fed. R. Civ. P. 12(b)(1). A motion to dismiss under Rule 12(b)(1) therefore challenges the power of a federal court to hear a claim or case. *See Petruska v. Gannon Univ.*, 462 F.3d 294, 302 (3d Cir.2006). In the face of a 12(b)(1) motion, the plaintiff has the burden to "convince the court it has jurisdiction." *Gould Elecs., Inc. v. United States*, 220 F3d 169, 178 (3d Cir.2000); *see also Kehr Packages v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir.1991) ("When subject matter jurisdiction is challenged under Rule 12(b)(1), the plaintiff must bear the burden of persuasion.").

III. ARGUMENT

A. The Constitutional Doctrine Of Standing And Mootness Generally

Article III of the United States Constitution limits the jurisdiction of the federal courts to "cases and controversies." U.S. Const. art. III §2. *Int'l Brotherhood of Boilermakers v. Kelly*, 815 F.2d 912, 914 (3d. Cir. 1987). However, "'a case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" *Id.* at 915 (quoting *Powell v. McCormack* 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969)). "That is, if developments occur during the course of adjudication that eliminate a plaintiff's personal stake in the outcome of a suit or prevent a court from being able to grant the requested relief, the case must be dismissed as moot." *Donovan ex. rel. Donovan v. Punxsutawney Area School Bd.*, 336 F.3d 211, 216 (3d Cir.2003). An offer of complete relief will generally moot the plaintiff's claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation. *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir.1991)("Once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate and a plaintiff who refuses to acknowledge this loses outright, under Fed.R.Civ.P. 12(b)(1), because he has no remaining stake.") (internal citation omitted); *see also* 13A Charles Alan Wright & Arthur R. Miller, Fed. Practice and Procedure: Jurisdiction 2d § 3533.2, at 236 (2d ed. 1984) ("Even when one party wishes to persist to judgment, an offer to accord all of the relief demanded may moot the case.").

B. The Third Circuit Has Held That The "Relation Back" Doctrine Precludes A Finding Of Mootness In The Class Action Context

Although the Third Circuit has not, in the context of an FLSA action, addressed the issue raised by Defendants' motion to dismiss, i.e., whether a defendant may use Rule 68 to "pick-off" a representative plaintiff, the Third Circuit has considered and rejected the use of such tactic in the context of other representative actions, in particular a Rule 23 class action. In *Weiss v. Regal Collection*, 385 F3d 337 (3d Cir. 2004), the plaintiff filed a class action complaint alleging violations of the Fair Debt Collection Practices Act ("FDCPA") and seeking statutory damages on behalf of himself and a putative class. Before filing an answer and before the plaintiff moved to certify the class, the defendants proffered a Rule 68 offer of judgment in an amount equal to the statutory limit on damages, plus costs and reasonable attorneys' fees. The plaintiff did not accept the offer of judgment and defendants subsequently moved to dismiss under Fed.R.Civ.P. 12(b)(1), arguing that plaintiff's claim was rendered moot because the offer of judgment provided him with the maximum damages available under the FDCPA. Applying traditional mootness principles, the district court dismissed plaintiff's complaint.

The Third Circuit reversed the district court, holding that the "relation back" doctrine precludes a finding of mootness prior to a motion for class certification. Rather than dismiss the action as moot, the Third Circuit held that the district court should have permitted the representative plaintiff to file a class certification motion, and that such motion would

"relate back" to the filing of the complaint, thereby eliminating any concerns that the representative plaintiff lacked standing to sue. *Id* at 348. In so holding, the Third Circuit stated as follows:

> There appears to be considerable authority that once a motion for class certification has been filed, the "relation back" doctrine explained by the Supreme Court in *Sosna v. Iowa*, 419 U.S. 393, 399, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975) comes into play. In *Sosna*, the Court recognized:
>
> > There may be cases in which the controversy involving the named plaintiff's is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.
>
> *Id*. at 402 n. 11, 95 S.Ct. 553. Furthermore, in *Geraghty* the Court held class certification may relate back to the filing of the complaint where claims are "so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." 445 U.S. at 399, 100 S.Ct. 1202 (1980). The mootness exception recognizes that, in certain circumstances, to give effect to the purposes of Rule 23, it is necessary to conceive of the named plaintiff as a part of an indivisible class and not merely a single adverse party even before the class certification question has been decided. By relating class certification back to the filing of a class

complaint, the class representative would retain standing to litigate class certification though his individual claim is moot. But the question in this case is whether the "relation back" doctrine should apply only after the filing of a motion for class certification or whether it may also be employed after the filing of a class complaint.

The "relation back" doctrine generally has been used for "inherently transitory" claims. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 52, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991) (quoting *Geraghty*, 445 U.S. at 399, 100 S.Ct. 1202). Although Weiss's claims here are not "inherently transitory" as a result of being time sensitive, they are "acutely susceptible to mootness," *Corner v. Cisneros*, 37 F.3d 775, 797 (2d Cir.1994), in light of defendants' tactic of "picking off" lead plaintiff's with a Rule 68 offer to avoid a class action. As noted, this tactic may deprive a representative plaintiff the opportunity to timely bring a class certification motion, and also may deny the court a reasonable opportunity to rule on the motion.

It bears noting that most of the cases applying the relation back doctrine have done so after a motion to certify the class has been filed. *See Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1048-49 (5th Cir. July 1981); *Susman v. Lincoln Am. Corp.*, 587 F.2d 866, 869-71 (7th Cir. 1978). Nonetheless, reference to the bright line event of the filing of the class certification motion may not always be well-founded. Representative actions vary according to the substantive claims and the courses of action. There are at least three distinct events on the path to a certified

> class: filing the class complaint, filing the motion for class certification, and a decision on the motion. Yet plaintiff's may file the class certification motion with the class complaint, and in some cases, include a motion for approval of an already negotiated settlement. Of course, the federal rules do not require certification motions to be filed with the class complaint, nor do they require or encourage premature certification determinations. It seems appropriate, therefore, that the class action process should be able to "play out" according to the directives of Rule 23 and should permit due deliberation by the parties and the court on the class certification issues.
>
> That said, the proper procedure is for the named representative to file a motion for class certification. That did not occur here. But neither was there undue delay. In circumstances like these, we believe the relation back doctrine should apply. Absent undue delay in filing a motion for class certification, therefore, where a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint. Because in this case, no motion for class certification was made, we will direct the trial court to allow Weiss to file the appropriate motion.

Id. at 346-48 (footnotes omitted).

The holding of the Third Circuit, i.e., that the "relation back" doctrine can be used to avoid mootness and permit representative actions to "play out" with "due deliberation" by the court on the certification issue,

applies equally in the context of a Section 216(b) collective action. Accordingly, Plaintiff respectfully suggests that the *Weiss* decision represents controlling authority and Defendants' motion should therefore be denied.[1]

Although Defendants inexplicably failed to cite or discuss the *Weiss* decision in their memorandum supporting their motion to dismiss, Plaintiff anticipates Defendants will argue that the Third Circuit's decision in *Weiss* is distinguishable because it was decided in the Rule 23 context. While there are certainly differences between Section 216(b) and Rule 23, the most significant being that Section 216(b) contemplates an "opt-in" class and Rule 23 typically provides for an "opt-out" class, these differences were not relevant to the Third Circuit's analysis and holding regarding the use of the "relation back" doctrine in response to a Rule 68 mootness argument. Indeed, several courts, analyzing this precise question in the wake of the Third Circuit's decision in Weiss, have recognized that, for purposes of the "relation back" doctrine, there is no difference between Rule 23 and Section 216(b). In *Sandoz v. Cingular Wireless, LLC*, 553 F.3d 913 (5th Cir. 2008), the Fifth Circuit held that the "relation back" doctrine applies as much in an FLSA case as in a Rule 23 case because both types of actions are susceptible to strategic mooting by defendants through the use of a Rule 68 offer of judgment. After a thorough discussion of *Weiss*, the Fifth Circuit concluded:

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[1] In the event that this Court determines that the *Weiss* decision is not controlling, Plaintiff submits that it has been the only decision issued by the Third Circuit that has addressed the issue in this case, albeit in a Rule 23 context, and, therefore, the analysis is at the very least persuasive authority.

> [T]he differences between class actions and FLSA § 216(b) collective actions do not compel a different result regarding whether a certification motion can "relate back" to the filing of the complaint. The status of a case as being an "opt in" or "opt out" class action has no bearing on whether a defendant can unilaterally moot a plaintiff's case through a Rule 68 offer of judgment. Although the differences between Rule 23 class actions and FLSA § 216(b) collective actions alter the conceptual mootness inquiry, each type of action would be rendered a nullity if defendants could simply moot the claims as soon as the representative plaintiff files suit. Thus, the policies behind applying the "relation back" principle for Rule 23 class actions apply with equal force to FLSA § 216(b) collective actions. *Cf Rubery v. Buth-Na-Bodhaige, Inc.*, 494 F.Supp.2d 178, 181 (W.D.N.Y.2007) (holding that the defendant's motion to dismiss based on its Rule 68 offer of judgment was premature because the court had not yet ruled on the plaintiff's motion for certification of the action as a class action or collective action). This principle also comports with the balance the FLSA attempts to strike. *See De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 306 (3d Cir.2003) (noting that Congress enacted the opt-in provision for FLSA collective actions in an attempt to "strike a balance to maintain employees' rights but curb the number of lawsuits").

Id. at 920. *See also, Nash v. CVS Caremark Corp., et al.*, –F.Supp.2d–, 2010 WL 446178 (D.R.I. Feb. 9, 2010) (application of the "relation back" doctrine in a collective action under the FLSA precluded a finding of mootness); *Yeboah v. Central Parking System*, 2007 WL 3232509, *3 (E.D.N.Y. Nov. 1, 2007)(recognizing

that the concerns that arise when Rule 68 is applied in the Rule 23 class action context are also present when Rule 68 is applied in the FLSA collective action context); *Rubery v. Buth-Na-Bodhaige, Inc*, 494 F.Supp.2d 178, 180-81 (W.D.N.Y. 2007) (same).

Contrary to Defendants' anticipated assertion, the differences between Rule 23 class actions and Section 216(b) collective actions actually weigh in favor of rejecting a finding of mootness. As recently explained by the District of Rhode Island, the procedural differences between Rule 23 class actions and Section 216(b) collective actions make the application of the "relation back" doctrine even more appropriate in a collective action:

> FLSA actions are more vulnerable to manipulation than Rule 23 actions. For the latter, filing a complaint tolls the statute of limitations for all the alleged class members, whether they know of the lawsuit or not. in contrast, parties alleged to be "similarly situated" in a § 216(b) case must affirmatively opt in to toll the limitations period.
>
> This means that defendants can bleed value out of a large pool of outstanding FLSA claims in a way they cannot with a comparable group of Rule 23 claims. "Picking off" § 216(b) plaintiffs delays the point at which any collective action can be provisionally certified. This stalls notification to potential "similarly situated" parties. The longer it takes for an FLSA action to mature, the lower members' damages will be once they opt in, given the two-year limitations period. In a parallel situation under Rule 23, the clock for absentees stops upon the filing of a complaint that raises their claims. Thus, even if employers pick off some named plaintiff's, the limitations period for

> absentees pauses while any applicable class action is pending.
>
> . . .
>
> Simply put, it is easier to drown collective actions than class actions. If allowed to use Rule 68 as a weapon, defendants can torpedo complaint after complaint, leaving opt-ins to swim for the nearest viable action as their claims leak value. This justifies a more relaxed mootness standard in FLSA cases than Rule 23 . . .

Nash, 2010 WL 446178, at ** 4-5 (citations omitted).

Furthermore, the discussion by the Third Circuit itself in *Weiss* reveals that the Court did not draw any meaningful distinction between Rule 23 and Section 216(b), for purposes of considering and adopting the "relation back" doctrine. Throughout its decision in Weiss, the Third Circuit cites and discusses its prior decision in *Lusardi v. Xerox Corp.*, 975 F.2d 964 (3d Cir. 1992), a case involving an age discrimination claim brought as a class action pursuant to the procedural enforcement mechanism of Section 216(b). In *Lusardi*, the plaintiff's, upon decertification of their Section 216(b) class, voluntarily settled their individual age discrimination claims and then subsequently filed a new motion for class certification pursuant to Section 216(b). The Third Circuit, in affirming the district court's dismissal of the class claims, noted that plaintiff's, having entered into individual settlements, no longer had justiciable claims and could not therefore pursue Section 216(b) certification. *Lusardi*, 975 F.2d at 979-80.

In *Weiss*, the Third Circuit expressed concern that its adoption of the "relation back" doctrine "creates some tension with our opinion in *Lusardi*." *Weiss*, 385

F3d at 348. In reconciling its decision in *Weiss* with its prior decision in *Lusardi*, however, the Third Circuit did not simply rely upon the obvious fact that *Lusardi* dealt with Section 216(b). Rather, the Third Circuit reconciled its decision with *Lusardi* by noting that *Lusardi* involved a voluntary settlement rather than an offer of judgment. Weiss, 385 F.3d at 348 ("In this appeal, the 'picking of scenarios described by the Supreme Court in *Roper* are directly implicated. In *Lusardi* they were not"). Plaintiff respectfully suggests that the failure of the Third Circuit to distinguish *Lusardi* on the basis that it involved Section 216(b) rather than Rule 23 is telling and directly undermines any suggestion that the procedural differences between Section 216(b) and Rule 23 are in any way relevant to the issues presented by Defendants' motion to dismiss[2] In short, Defendants' anticipated argument that the Weiss decision is inapplicable because it was decided in the Rule 23 context is nothing more than a red herring.

C. Defendants' Argument in Favor of Dismissal Completely Ignores and/or Overlooks The "Relation Back" Doctrine

In their memorandum in support of their motion to dismiss, Defendants make the unremarkable argument that Plaintiff cannot "revive a moot claim"

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[2] Notably, in *Brown v. Phildelphia Hous. Auth*, 350 F.3d 338 (3d Cir. 2003), upon which Defendants rely for the proposition that once a defendant makes an offer of judgment, the "district court loses subject matter jurisdiction over the plaintiff's case," the Third Circuit again cited and relied upon *Lusardi* with no mention of the fact that *Lusardi* arose under Section 216(b). See Weiss, 385 F.3d at 348, n. 20. Indeed, Defendant actually cites the portion of the Brown decision which quotes *Lusardi*. (Defendants' brief at pp. 3-5).

because, prior to a class certification ruling, a Section 216(b) plaintiff; unlike a Rule 23 class plaintiff, has no "present interest" in representing the class. (Defendants' Brief p. 6). Plaintiff concedes this argument. However, the analysis does not stop there. The application of the "relation back" doctrine must be considered, consistent with the Third Circuit's holding in Weiss. As discussed, supra, the fact that Plaintiff is a Section 216(b) plaintiff does not compel a different result than what was reached in *Weiss*. *See Sandoz*, 553 F.3d at 920 ("[T]he policies behind applying the 'relation back' principle for Rule 23 class actions apply with equal force to FLSA §216(b) collective actions.")(citation omitted).

Furthermore, *Cameron-Grant v. Maxim Health Care Svcs., Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003), a case in which, according to the Defendants, "the Eleventh Circuit analyzed the specific issue currently before this Court" (Defendants' Brief p. 7), is fundamentally different from the instant action.[3] In *Cameron-Grant*, four employees filed a collective action alleging violations of the FLSA. The four named plaintiff's then filed a motion for permission to proceed as a collective action and for an order permitting court-supervised notice. Subsequently, three of the four named plaintiff's filed a stipulation of

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[3] In fact, in a decision issued after *Cameron-Grant*, the Southern District of Florida explicitly stated that the Eleventh Circuit has never addressed the issue currently before this Court: "The Eleventh Circuit has never addressed the issue of the effect of an offer of judgment made to a Plaintiff in a FLSA collective action. This Court, however, finds the reasoning of several other courts which have been reluctant to dismiss a FLSA collective action after an offer of judgment has been made to be persuasive." *Guerra v. Big Johnson Concrete Pumping, Inc.* 2006 WL 2290517, ** 2-3 (S.D. Fla. Jun. 28, 2006).

dismissal with prejudice after settling their claims voluntarily with defendant. The defendant then stipulated to paying the fourth plaintiff's claims for unpaid wages and overtime pay. (The fourth plaintiff had other claims pending.) Thereafter, the district court denied the then pending motion for class notice and certification. After denial of that motion, the fourth plaintiff and defendant agreed to the dismissal of his remaining claims and the district court entered final judgment. The fourth plaintiff then attempted to appeal the district court's order denying the motion for class notice and certification. The Eleventh Circuit held that the denial of the motion for class notice and certification was not reviewable on appeal because, under the circumstances presented, the named plaintiff's claims had become moot.

Cameron-Grant is distinguishable from this case and does not compel the result sought by Defendants for the following reasons:

1) *Cameron-Grant* involved a **voluntary** settlement and dismissal of all claims, **not** an offer of judgment by which the defendant sought to unilaterally terminate an FLSA collective action before it had a chance to be certified;

2) The issue in *Cameron-Grant* was whether the named plaintiff, who **voluntarily** settled and dismissed his claims, had standing to appeal a denial of a motion for class notice; and,

3) The Eleventh Circuit in *Cameron-Grant* was NI presented with, and did not decide, the issue of whether a defendant may unilaterally terminate an FLSA collective action through an individual offer of judgment before the certification issue.

Thus, not only do Defendants completely overlook the applicability of the "relation back" doctrine, which would preclude a finding of mootness in this case, but the principal authority on which they rely is wholly distinguishable.

D. Courts Routinely Have Been Reluctant To Permit Defendants To "Pick-off" Individual Plaintiff's In A Class/Collective Action

Allowing a defendant to use a Rule 68 offer of judgment to "pick-off" individual claimants before class certification can be reached effectively nullifies representative actions because a defendant can easily pay off any given member of a class for a fraction of the entire class's potential total damages. Indeed, one of the primary reasons for representative actions in the first place is because individual damages are typically small. *Deposit Guaranty Nat. Rank Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980)("Pick-offs" "obviously would frustrate the objectives of class actions" —that is, enabling plaintiff's to redress wrongs even "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages . . . ."). Accordingly, courts generally look unfavorably upon this inherently inequitable tactic of "picking-off" representative plaintiff's and routinely have disallowed this practice,

In *Roper*, the Supreme Court recognized the inherent evils in allowing a defendant to "short circuit" a class action by paying off individual class representatives. In holding that the individual class representatives retained an interest in appealing the district court's denial of class certification subsequent

to offers of judgment to the named plaintiff's, the Court stated as follows:

> A district court's ruling on the certification issue is often the most significant decision rendered in these class-action proceedings. To deny the right to appeal simply because the defendant has sought to "buy off" the individual private claims of the named plaintiff's would be contrary to sound judicial administration. Requiring multiple plaintiff's to bring separate action, which effectively could be "picked off" by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover, it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement.

Id. at 339.

Although a plaintiff in a Section 216(b) collective action, in contrast to a Fed. R. Civ. P. 23 plaintiff; does not retain an interest in representing any class members other than those who affirmatively "opt-in," many courts, recognizing that the rationale set forth in *Roper* applies with equal force in Section 216(b) collective actions, have concluded that a Rule 68 "pick-off" is not appropriate in the context of the FLSA. For example, in *Yeboah*, the defendant in an FLSA case, as here, served a Rule 68 Offer of Judgment and then moved to dismiss based on its assertion that the offer more than fully satisfied plaintiff's claims. In denying the defendant's motion, the court found:

> The application of Fed. R. Civ. P. 68 in the FLSA context raises pragmatic concerns, including the

danger that defendants will "provid[e] an offer of judgment to the initial plaintiff in a FLSA collective action in order to bar the case from proceeding as to all similarly situated plaintiff's," which, as one district court observed, would "violate[ ] the very policies behind the FLSA." (citation omitted). The Supreme Court has remarked on the importance of guarding against this danger in the related context of Rule 23 class actions; "Requiring multiple plaintiff's to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions . . ." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980). *See also, Weiss v. Regal Collections*, 385 F.3d 337, 344 (3d Cir. 2004)("[A]llowing the defendant here to 'pick off' a representative plaintiff with an offer of judgment less than two months after the complaint if filed may undercut the viability of the [Rule 23] class action procedure, and frustrate the objectives of this procedural mechanism . . .")(citation omitted). Defendant objects to plaintiff's citation to *Roper*, *Weiss*, and other decisions in the Rule 23 context. These cases are inapposite, defendant insists, since permitting a Rule 68 offer to moot a FLSA plaintiff's claims does not risk prejudice to absent class members, as it does in the Rule 23 context, where any judgment binds all class members save those who have opted out. However, even if defendants are correct that permitting defendants to "pick off" individual FLSA plaintiff's presents no danger of prejudicing absent class members, as it would in the Rule 23

> context, the Roper Court described at least two other dangers. First, as noted above, the Court declared that permitted such "pick-offs" "obviously would frustrate the objectives of class actions" — that is, enabling plaintiff's to redress wrongs even "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages . . ." 445 U.S. at 339. Second, the Court observed that permitting pick-offs "would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement." *Id.* Both dangers appear to exist in the FLSA context, as well.

Yeboah, 2007 WL 3232509 at ** 2-3.

Similarly, in *Reyes v. Carnival Corp.*, 2005 WL 4891058 (S.D.Fla. May 25, 2005), the plaintiff sought relief on behalf of himself and others similarly situated under the FLSA. The defendant made an offer of judgment to the named plaintiff and moved to dismiss the action for lack of subject matter jurisdiction on the basis that the offer of judgment for more than complete relief rendered the case moot. The court disagreed, stating that "the defense strategy of providing an offer of judgment to the initial plaintiff in an FLSA collective action in order to bar the case from proceeding as to all similarly situated plaintiff's violates the very policies behind the FLSA . . . Permitting a defendant to evade a collective action by making an offer of judgment at the earliest possible time defeats the purpose of the collective action mechanism." *Reyes*, 2005 WL 4891058 at *3.

Numerous other courts have recognized concerns with allowing a defendant to "pick off" individual claimants before class certification. *See, e.g., Rubery*,

494 F.Supp.2d at 180-81 ("in assessing whether dismissal is appropriate, this Court is mindful of the inherent danger that motions to dismiss grounded in a Rule 68 offer may be wielded as a strategic weapon to frustrate the FLSA's very object — ensuring that every employee receives 'a fair day's pay for a fair day's work.' (citation omitted)); *Guerra v. Big Johnson Concrete Pumping, Inc.*, 2006 WL 2290517, *3 (S.D.Fla. June 26, 2006)("[A]llowing Defendant's offers of judgment to moot this case is contrary to the broad remedial purpose of the FLSA and the specific purpose of section 216(b), which is to-reduce the number of multiple lawsuits filed against the same employer."); *see also Morales v. Arcadio v. Shannon Produce Farms*, 237 F.R.D. 700 (S.D.Ga. 2006) (granting plaintiff's motion to invalidate defendant's offer of judgment served while Section 216(b) notice to the putative class was pending); *Roble v. Celestica Corp.*, 627 F.Supp.2d 1008 (D.Minn. 2007)(conditionally certifying FLSA collective action after Rule 68 offer of judgment); *Bah v. Shoe Mania, Inc.*, 2009 WL 1357223 (S.D.N.Y. May 13, 2009)(denying defendant's motion to dismiss based on mootness); *Bowens v. Atlantic Maintenance Corp.*, 546 F.Supp. 2d 55 (E.D.N.Y. 2008)(same).

Furthermore, as the District Court of Kansas has noted, one of the more troubling aspects of permitting defendants to use Rule 68 to "pick off" plaintiff's in a collective action is that such tactic essentially creates a "procedural loop" for FLSA plaintiff's. In *Geer v. Challenge Financial Investors Corp.*, 2006 WL 704993 (D.Kan. Mar. 14, 2006), the court explained this "procedural loop" as follows:

> It is possible for defendants to continue making offers of judgments to plaintiff's who opt in and

> then ask the court to consider dismissal based on the lack of subject matter jurisdiction. At the same time, plaintiff's may continue to introduce new plaintiff's whose presence will moot the issue of dismissal. Through the motion to dismiss, the court will be drawn into the parties' tussle over jurisdiction . . . Although nothing in the rules prevents parties from engaging in tactics to moot the case early on, this court is reluctant to allow defendants to bar the courtroom doors so early in the litigation.

Geer, 2006 WL 704933 at *3.

The Supreme Court has identified the inherent dangers in allowing defendants to "pick off" individual plaintiff's in a representative action by utilizing a Rule 68 offer of judgment Recognizing that the Supreme Court's rationale applies with equal force in the context of an FLSA collective action, courts around the country have disallowed the "picking off" of FLSA representative plaintiff's. Plaintiff respectfully suggests that these decisions, issued under factually identical circumstances to this case, are highly persuasive and should be followed.

E. Alternatively, And In Any Event, Dismissal Is Inappropriate At This Early Procedural Juncture

A plaintiff can only waive his or her rights under the FLSA with court approval or the approval of the Secretary of the Department of Labor. The Seventh, Eleventh and Federal Circuits have all found that purely private settlements of FLSA claims are unenforceable. *Walton v. United Consumers Club, Inc.*, 786 F.2d 303 (7th Cir. 1986); *Lynn's Food Stores, Inc. v. U.S.*, 679 F.2d 1350 (11th Cir. 1982); *O'Connor v. U.S.*, 308 F.3d 1233 (Fed.Cir. 2002); *cf Lignore v.*

Univ. of Penn. Hospital, 2007 WL 1300733, *3, n.7 (E.D.Pa. May 1, 2007)("Though our court of appeals has not decided the issue, in *Burke v. Wackenhut Corp.*, 2007 WL 694302, *2 (M.D.Pa. Mar. 5, 2007), the court observed that 'in dicta, the Third Circuit has indicated that [wage] disputes may be settled privately, without court approval.'" (*citing Coventry v. United States Steel Corp.*, 856 F.2d 514, 521 n. 8 (3d Cir. 1988))). There has been no review and/or approval by this Court of Defendants' offer of judgment to Plaintiff To the extent that such a review and approval is necessary, Plaintiff suggests that it should occur after an appropriate record is set forth before the Court.

In *Luna v. Del Monte Fresh Produce (Southeast) Inc.*, 2008 WL 754452 (ND, Ga. Mar. 19, 2008), plaintiff's sought relief on behalf of themselves and others similarly situated under the FLSA. The parties conducted limited discovery and plaintiff's filed a motion for certification as an FLSA collective action. Subsequently, 47 plaintiff's opted into the lawsuit. Defendants then served Rule 68 offers of judgment on 42 of the opt-in plaintiff's. The Northern District of Georgia, relying on *Lynn's Food Stores*, explained why the defendant's offers of judgment were procedurally premature and, thus, invalid:

> The Eleventh Circuit has held that FLSA claims may only be abridged or settled after a court reviews the proposed settlement to ensure that it is fair and reasonable. (citation omitted).
>
> . . .
>
> Defendants have not presented its Rule 68 offers to the Court for approval, with good reason. At this stage in the litigation, there is absolutely no basis for determining whether the offers are fair

> and reasonable. The parties have not conducted any merits discovery or provided even an estimate as to the amount plaintiffs might be entitled to recover on their FLSA and AWPA claims.

Id, 2008 WL 754452, *12.

This case is at an even earlier procedural juncture than in *Luna*. The Parties have not yet begun discovery. This Court held a Fed.R.Civ.P. 16 Pretrial Conference with counsel for the Parties on March 8, 2010. Following that conference, on March 10, 2010, this Court entered an order setting forth a discovery and motions practice schedule designed to address the conditional certification issues under Section 216(b). Consistent with the Supreme Court's admonition in *Roper* and the instruction set forth by the Third Circuit in *Weiss*, this Court should let the process for collective action certification "play out," pursuant to the process that it has created.

IV. CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction be DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 16th day of April, 2010, that the foregoing **Plaintiff's Brief in Opposition to Defendants' Motion to Dismiss for Lack of Subject-Matter Jurisdiction** was served on all counsel of record via the Court's electronic filing system.

/s/ Gary F. Lynch

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No.: 09-5782
JURY TRIAL DEMANDED

LAURA SYMCZYK, AN INDIVIDUAL, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION, AND ELDERCARE RESOURCES CORPORATION, D/B/A GENESIS ELDERCARE,
Defendants.

FIRST AMENDED CLASS/COLLECTIVE ACTION COMPLAINT[1]

Plaintiff Laura Symczyk, on behalf of herself and others similarly situated, alleges as follows:

1. This is a nationwide collective action under the Fair Labor Standards Act, 29 U.S.C. § 201. *et seq.* ("FLSA"), brought on behalf of plaintiff and all other persons similarly situated pursuant to 29 U.S.C. §§ 207 and 216(b), specifically, as follows:

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[1] Pursuant to Stipulated Court Order (D.E. # 8), Plaintiff herein amends this Complaint to, *inter aila*, incorporate the state causes of action originally brought in *Symczyk v. Genesis Healthcare Corp.*, No. 2:10-cv-1378-MMB ("State Case"). Accordingly, for purposes of determining the statute of limitations for Plaintiff's slate law class claims, the date of the filing of the State Claim controls.

> All persons employed within the three years preceding the filing of this action by Defendants (as hereinafter defined), whose pay was subject to an automatic 30 minute meal period deduction even when they performed compensable work during the unpaid "meal break" (the "Collective Action Class").

2. In addition to the nationwide FLSA claims, Plaintiff brings this action as a state wide class action on behalf of all persons who, at any time during the past three years and up until the date of entry of judgment are or were employed by Defendants at any of Defendants' Pennsylvania facilities to recover all unpaid wages under the Pennsylvania Minimum Wage Act of 1968 ("MWA"), as amended, 43 Pa. C.S.C. §333.101-333.115; the Pennsylvania Wage Payment and Collection Law ("WPCL") 43 Pa. C.S.A. §260.1 *et seq.*; and Pennsylvania common law ("Pennsylvania state law claims").

3. Plaintiff brings the Pennsylvania state law claims as a class action pursuant to Rules 23(a) and (b) of the Federal Rules of Civil Procedure on behalf of the following persons similarly situated:

> All persons employed within the three years preceding the filing of this action by Defendants at any of its Pennsylvania facilities, whose pay was subject to an automatic 30 minute meal period deduction even when they performed compensable work during the unpaid "meal break" (the "PA State Law Class").

4. The Collective Action Class and the PA State Law Class are collectively referred to herein as the Classes.

5. As explained herein, under applicable employment laws, Plaintiff and members of the Classes are entitled to compensation for all hours worked. Despite this plain truth, and although Defendant regularly required Plaintiff and class members to work through all or part of their meal break, Defendant subjected Plaintiff and class members to automatic deductions for their scheduled meal breaks.

JURISDICTION AND VENUE

6. This Court has original jurisdiction over Plaintiff's FLSA claims pursuant to 29 U.S.C. §216(b) and 28 U.S.C. §1331.

7. This Court has original jurisdiction over Plaintiff's Pennsylvania state law claims pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. §1332(d)(2), because at least one member of the PA State Law Class is a member of a state that is different from at least one of the Defendants and the matter in controversy exceeds the sum or value of $5,000,000.

8. In addition, this Court has supplemental jurisdiction under 28 U.S.C. §1367 over the Pennsylvania state law claims because those claims derive from a common nucleus of operative facts.

9. Venue for this action properly lies in the Eastern District of Pennsylvania, pursuant to 28 U.S.C. §1391(b), because the claim arose in this judicial district.

PARTIES

10. Plaintiff, Laura Symczyk, is an adult individual residing in Philadelphia. Plaintiff was employed by Defendants from April, 2007 through December, 2007 and worked at Pennypack Center. She spent her

time working as a Registered Nurse at the facility. While working for Defendants, Plaintiff was regularly required to perform compensable work during unpaid "meal breaks."

11. Plaintiff consents in writing to be a party to this collective action pursuant to 29 U.S.C. §216(b).

12. Genesis Healthcare Corporation ("Genesis") is an integrated skilled nursing center and assisted living communities enterprise headquartered at 101 E. State Street, Kennett Square, Pennsylvania. Genesis is comprised of 200 skilled nursing centers and assisted living communities throughout 13 eastern states.

13. Upon information and belief Genesis is a parent corporation of Eldercare Resources Corporation, d/b/a Genesis Eldercare ("Eldercare"):

14. Genesis and Eldercare are related organizations through, for example, common membership, governing bodies, trustees and/or officers and benefit plans.

15. Upon information and belief, at all times, the wage and hour and all related employee compensation policies of Genesis and Eldercare are and were centrally and collectively dictated, controlled, and ratified.

16. Upon information and belief, Genesis and Eldercare share common management and have common ownership.

17. As such, Genesis and Eldercare are the employer – single, joint or otherwise – of the Plaintiff and class members.

18. For purposes of this complaint, Genesis and Eldercare are hereinafter collectively referred to as "Defendants."

19. Defendants have approximately 36,000 employees.

FACTUAL BACKGROUND

20. This action is filed on behalf of all non-exempt employees of Defendants whose pay is subject to an automatic meal break deduction even when they perform compensable work during their meal breaks. These persons include, but are not limited to, secretaries, housekeepers, custodians, clerics, porters, registered nurses, licensed practical nurses, nurses' aides, administrative assistants, anesthetists, clinicians, medical coders, medical underwriters, nurse case managers, nurse interns, nurse practitioners, practice supervisors, professional staff nurses, quality coordinators, resource pool nurses, respiratory therapists, senior research associates, operating room coordinators, surgical specialists, admissions officers, student nurse technicians, trainers, and transcriptionists employed at any of Defendants' facilities during the three years preceding the filing of this action.

21. Given the demands of the health care industry and staffing shortages, Defendants know that to get the tasks done that it assigns to Plaintiff and class members, Plaintiff and class members have to work through their unpaid "meal breaks."

22. All non-exempt employees of Defendants are subjected to Defendants' "Meal Break Deduction Policy."

23. Upon information and belief, Defendants maintain the "Meal Break Deduction Policy" at all of its facilities.

24. Under the "Meal Break Deduction Policy," Defendants' computerized time and attendance system automatically deducts a 30 minute meal period per work shift.

25. Under Defendants' "Meal Break Deduction Policy," Defendants improperly and illegally shift the burden to Plaintiff and class members to ensure that non-qualifying "meal breaks" are not deducted from their pay.

26. Plaintiff and members of the Classes often perform compensable work for Defendants during their uncompensated "meal breaks."

27. Defendants do not ensure that Plaintiff and members of the Classes are completely relieved of their work duties during their uncompensated "meal breaks."

28. Plaintiff and members of the Classes are routinely not completely relieved of their job duties during their uncompensated "meal breaks."

29. Plaintiff and members of the Classes routinely are required to stay at their duty post during their uncompensated "meal breaks."

30. Defendants do not prohibit Plaintiff and members of the Classes from working during their "meal breaks" and routinely suffers or permits Plaintiff and class members to perform such work.

31. Defendants routinely fail to ensure that unauthorized work is not being performed during employee "meal breaks."

32. In fact, although Defendants automatically deduct 30 minute meal periods, Defendants expect Plaintiff and members of the Classes to be available to work throughout their shifts and consistently require its employees to work during unpaid "meal breaks."

33. Plaintiff and members of the Classes are expected to eat without any change in demands from patients or relief by additional staff.

34. Plaintiff and members of the Classes are often required to respond to pages; as well as requests by patients, co-workers and management, during unpaid "meal breaks."

35. Defendants know and/or have reason to believe that Plaintiff and members of the Classes perform work during their unpaid "meal breaks."

36. Plaintiff and members of the Classes perform work for Defendants, on Defendants' premises, in plain sight, and often at management's request during their unpaid "meal breaks."

37. Defendants have observed Plaintiff and members of the Classes working through their unpaid "meal breaks." Defendants have directed Plaintiff and members of the Classes to work during their unpaid "meal breaks."

38. Even though Defendants know that Plaintiff and members of the Classes are working during "meal breaks," Defendants fail to compensate Plaintiff and members of the Classes for their work, electing instead to sit back and accept the benefits of Plaintiff and members of the Classes' uncompensated work.

39. Some evidence generally reflecting the number of uncompensated hours worked by each class member and the compensation rates for the relevant work periods is in the possession of Defendants.

40. While Plaintiff is unable to state at this time the exact amount owed to the class, Plaintiff believes that such information will become available during the course of discovery. When an employer fails to keep complete and accurate time records, employees may establish the hours worked solely by their testimony and the burden of overcoming such testimony shifts to the employer.

CLASS/COLLECTIVE ACTION ALLEGATIONS

41. The preceding paragraphs are incorporated by reference as if the same were fully set forth herein.

42. Plaintiff brings this action on behalf of the Collective Action Class as a collective action pursuant to the Fair Labor Standards Act, 29 U.S.C. §§ 207 and 216(b), and on behalf of the PA State Law Class for claims under the Pennsylvania Minimum Wage Act of 1968 ("MWA"), as amended, 43 Pa. C.S.C. §333.101-333.115; the Pennsylvania Wage Payment and Collection Law ("WPCL") 43 Pa. C.S.A. §260.1 *et seq.*; and Pennsylvania common law, as a class action pursuant to Fed.R.Civ.P. 23.

43. Regarding the Collective Action Class, Plaintiff specifically brings this FLSA collective action on behalf of herself and all other persons similarly situated pursuant to 29 U.S.C. §§ 207 and 216(b), as follows:

> All persons employed within the three years preceding the filing of this action by Defendant whose pay was subject to an automatic

> 30 minute meal period deduction even when they performed Compensable work during the unpaid "meal break."

Upon information and belief, Plaintiff believes that the definition of the class will be further refined following discovery.

44. Regarding the PA State Law Class, Plaintiff specifically brings this action on behalf of herself and all other persons similarly situated pursuant to Fed. R. Civ. P. 23, with the class consisting of

> All persons employed within the three years preceding the filing of this action by Defendants at any of its Pennsylvania facilities, whose pay was subject to an automatic 30 minute meal period deduction even when they performed compensable work during the unpaid "meal break."

Upon information and belief, Plaintiff believes that the definition of the class will be further refined during the course of discovery.

45. The claims under the FLSA may be pursued by those who opt-in to this case pursuant to 29 U.S.C. §216(b). The claims under the MWA, WPCL, and Pennsylvania common law may be pursued by all similarly-situated persons who do not opt-out of the PA Class pursuant to Fed.R.Civ.P. 23.

46. The members of each of the Classes are so numerous that joinder of all members is impracticable. While the exact number of the members of the Classes is unknown to Plaintiff at this time, and can only be ascertained through appropriate discovery, Plaintiff believes there are thousands of individuals in each defined class.

47. There are questions of law and fact common to the Classes which predominate over any questions affecting individual members only. These factual and legal questions include:

a, Whether Plaintiff and class members were expected to and/or mandated to regularly work during unpaid meal breaks;

b. Whether Defendant failed to pay Plaintiff and class members for all hours that they worked because of the fact that they automatically deducted 30 minute meal periods despite the fact that Plaintiff and members of the Classes regularly performed compensable work during "meal breaks";

c. Whether Defendant failed to pay Plaintiff and members of the Classes all overtime compensation due to them by virtue of their "Meal Break Deduction Policy";

d. The correct statute of limitations for Plaintiff's and members of the Classes' claims;

e. The correct method of calculating back overtime pay;

f. Whether Plaintiff and members of the Classes are entitled to compensatory damages, and if so, the means of measuring such damages;

g. Whether Plaintiff and members of the Classes are entitled to restitution;

h. Whether Defendant is liable for pre judgment interest; and

i. Whether Defendant is liable for attorney's fees and costs.

48. Defendants have acted and refused to act on grounds generally applicable to the Classes.

49. The claims of the representative Plaintiff are typical of the claims of the Classes in that Plaintiff was denied overtime wages as a result of Defendants' uniform policy of not compensating its non-exempt employees for all hours worked. This is the predominant issue which pertains to the claims of each and every class member.

50. The class action/collective action mechanism is superior to other available methods for a fair and efficient adjudication of the controversy. The damages suffered by individual members of the Classes may be relatively small when compared to the expense and burden of litigation, making it virtually impossible for members of the Classes to individually seek redress for the wrongs done to them.

51. Furthermore, even if any member of the Classes could afford individual litigation against Defendants, it would be unduly burdensome to the judicial system. The instant methodology, when compared to voluminous individual actions, has fewer management difficulties and provides the benefits of unitary adjudication, economies of scale, and comprehensive supervision by a single court. Concentrating this litigation in one forum will promote judicial economy and parity among the claims of individual members of the Classes and provide for judicial consistency.

52. Plaintiff will fairly and adequately protect the interests of the Classes, as her interests are in complete alignment with those of the entire class, i.e., to prove and then eradicate Defendants' illegal

employment practice of not paying overtime wages to their non-exempt employees.

53. Counsel for Plaintiff will adequately protect the interests of the Classes. Such counsel is experienced with employment/class litigation and has previously served as class counsel in employment litigation.

54. Plaintiff and the Classes she represents have suffered and will continue to suffer irreparable damage from the illegal policy, practice and custom regarding Defendants' pay practices.

55. Defendants have engaged in a continuing violation of the FLSA.

56. Plaintiff, as well as the individuals she represents, was denied overtime wages as a result of Defendants' pay practices. This violation was intended by Defendants and was willfully done.

57. Defendants' action in denying overtime wages to Plaintiff was intentional and constitutes a willful violation of the FLSA.

58. Defendant has engaged in a continuing violation of the MWA and the WPCL.

59. Defendants' action in denying wages for all hours worked was intentional and constitutes a willful violation of the MWA.

60. Defendants' action in denying overtime wages to Plaintiff was intentional and constitutes a willful violation of the MWA and the WPCL.

COUNT I - FLSA

61. The allegations set forth in the preceding paragraphs are incorporated herein.

62. At all relevant times, Defendants have been an employer engaged in interstate commerce consistent with 29 U.S.C. §§206(a) and 207(a). At all relevant times, Defendants employed Plaintiff and each member of the Collective Action Class consistent with the terms of the FLSA.

63. At all relevant times, Defendants have had annual gross revenues in excess of $500,000.00.

64. As a consequence of Defendants' employment practices whereby it automatically deducts thirty minutes for meal breaks from the pay of hourly, non-exempt employees, Plaintiff and class members were denied statutory overtime wages.

65. Plaintiff and class members were employees of Defendants within the meaning of the FLSA and, as such, were entitled to the benefits of the FLSA's overtime wage requirements.

66. Defendants' policy of denying Plaintiff and class members overtime wages represents and results in a violation of the FLSA's minimum wage requirements.

67. Defendants have failed to pay appropriate overtime wages under the FLSA.

WHEREFORE, Plaintiff respectfully requests:

A. All applicable statutory damages;

B. A Declaration that Defendants have violated the FLSA;

C. An Order designating this action as a collective action and directing the issuance of notice pursuant to 29 U.S.C. §216(b);

D. An Order appointing Plaintiff and her counsel to represent those individuals opting in to the collective action;

E. An Order awarding counsel for Plaintiff reasonable attorneys' fees and costs; and

F. Any further relief which the Court deems appropriate under the circumstances.

COUNT II – MWA

68. The allegations set forth in the preceding paragraphs are incorporated herein.

69. The MWA provides in relevant part:

> "Employees shall be paid for overtime not less than one and one-half times the employee's regular rate as prescribed in regulations promulgated by the secretary."

43 P.S. §333.104(c).

70. As a consequence of Defendants' employment practices whereby it automatically deducts thirty minutes for meal breaks from the pay of hourly, non-exempt employees, Plaintiff and class members were denied statutory overtime wages.

71. Plaintiff and class members were employees of Defendants within the meaning of the MWA and, as such, were entitled to the benefits of the MWA's overtime wage requirements.

72. Defendants are employer's within the meaning of the MWA.

73. Defendants' policy of denying Plaintiff and class members overtime wages represents and results in a violation of the MWA's minimum wage requirements.

74. Defendants have failed to pay appropriate overtime wages under the MWA.

WHEREFORE, Plaintiff respectfully requests:

A. That Defendants' conduct be declared to be in violation of the MWA;

B. That Plaintiff and class members are granted a permanent injunction enjoining Defendants, its officers, agents, successors, employees, attorneys, assigns, and other representatives, and all those acting in concert with it at its direction, from engaging in any employment policy or practice which violates the MWA;

C. That Defendants be ordered to make whole those persons adversely affected by the policies and practices described herein by providing appropriate back pay, and reimbursement for lost wages in an amount to be shown at trial;

D. That Defendants be ordered to pay appropriate back pay to Plaintiff and class members;

E. An Order designating this action as a class action;

F. An Order appointing Plaintiff and her counsel to represent the class;

G. Award counsel for Plaintiff reasonable attorneys' fees and costs; and

H. Award any further relief which the Court deems appropriate under the circumstances.

COUNT III - WPCL

75. The allegations set forth in the preceding paragraphs are fully incorporated herein.

76. The WPCL provides in relevant part:

> "Every employer shall pay all wages, other than fringe benefits and wage supplements, due to his employees on regular paydays designated in advance by the employer...All wages, other than fringe benefits and wage supplements, earned in any pay period shall be due and payable within the number of days after the expiration of said pay period as provided in a written contract of employment or, if not so specified, within the standard time lapse customary in the trade or within 15 days from the end of such pay period. The wage shall be paid in lawful money of the United States or check, except that deductions provided by law, or as authorized by regulation of the Department of Labor and Industry for the convenience of the employer, may be made..."

43 P.S. § 260.3.

77. Plaintiff and class members are/were employees of Defendants within the meaning of the WPCL and, as such, are entitled to timely payment of wages due to them.

78. Defendants are employers within the meaning of the WPCL.

79. Defendants' policy of subjecting Plaintiffs' and class members' pay to automatic meal break deductions even when they performed compensable work results in a violation of the WPCL.

80. Plaintiff and class members have entered into an unwritten agreement with Defendants pursuant to which Plaintiff and class members are to receive certain wages, in compensation for their work for Defendants.

81. Defendants' failure to pay wages for every hour worked, as required by Pennsylvania law, represents a violation of its oral agreement with Plaintiff and class members.

WHEREFORE, Plaintiff respectfully requests:

A. That Defendants' conduct be declared to be in violation of the WPCL;

B. That Plaintiff and class members be granted a permanent injunction enjoining Defendants, its officers, agents, successors, employees, attorneys, assigns, and other representatives, and all those acting in concert with it at its direction, from engaging in any employment policy or practice which violates the WPCL;

C. That Defendants be ordered to make whole those persons adversely affected by the policies and practices described herein by providing appropriate back pay, and reimbursement for lost wages in an amount to be shown at trial;

D. That Defendants be ordered to pay appropriate liquidated damages to Plaintiff and class members;

E. An Order designating this action as a class action;

F. An Order appointing Plaintiff and her counsel to represent the class;

G. Award counsel for Plaintiff reasonable attorneys' fees and costs; and

H. Award any further relief which the Court deems appropriate under the circumstances.

COUNT IV – UNJUST ENRICHMENT

82. The allegations set forth in the preceding paragraphs are fully incorporated herein.

83. Plaintiff brings this Count III in the alternative to her claim under the WPCL.

84. Plaintiff and class members were not paid wages for every hour that they worked.

85. Defendants retained the benefits of Plaintiff's and class members' uncompensated work under circumstances which rendered it inequitable and unjust for Defendants to retain such benefits without paying for their value.

86. Defendants were unjustly enriched by requiring Plaintiff and class members to work hours for which they were not compensated.

WHEREFORE, Plaintiff respectfully requests:

A. That Defendants are declared to have been unjustly enriched;

B. That Defendants be ordered to pay back to Plaintiff and the class the amounts representing its unjust enrichment;

C. An Order designating this action as a class action;

D. An Order appointing Plaintiff and her counsel to represent the class;

E. Award counsel for Plaintiff reasonable attorneys' fees and costs; and

F. Award any further relief which the Court deems appropriate under the circumstances.

Dated: April 23, 2010

Respectfully submitted,

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Case No. 2:09-cv-05782-MMB
Honorable Michael M. Baylson
(Filed via Electronic Case Filing System)

LAURA SYMCZYK,
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORPORATION,
Defendants.

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

On March 23, 2010, Defendants Genesis HealthCare Corporation and ElderCare Resources Corporation (collectively, "Defendants") moved to dismiss this Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("FLSA") lawsuit because Plaintiff Laura Symczyk ("Ms. Symczyk") rejected a Rule 68 Offer of Judgment (the "Offer") that provided her with complete relief for any and all of her alleged damages, fees, and costs. In response, Ms. Symczyk notably does not contest the sufficiency of Defendants' Offer, *i.e.* she makes no claim that the Offer does not exceed her maximum potential recovery. Instead, she attacks Defendants' strategy in issuing the Offer. She asserts it is an attempt to "pick-off" Ms. Symczyk's claim before this Court can render a conditional decision on FLSA collective (not class) certification.

Ms. Symczyk misses the point. In her failed attempt to demonstrate some perceived unfairness of the impact of the Offer, she blurs, if not outright confuses, the significant procedural differences involved in litigating purported collective claims under the FLSA as opposed to class claims under Fed. R. Civ. P. 23. Rule 23 does not apply to this case and, as explained below, its inapplicability is not a distinction without a difference. Thus, it remains: where, as here, the Offer fully resolves the plaintiff's claim, the plaintiff has not yet moved for certification, conditional or otherwise, and not a single individual has even attempted to join the action, courts regularly dismiss such cases. Accordingly, this Court should honor Congress's intent to prohibit class actions under the FLSA and dismiss Ms. Symczyk's FLSA claim in its entirety.

I. THE OFFER COMPLETELY MOOTS MS. SYMCZYK'S FLSA CLAIM COMPELLING ITS DISMISSAL FOR LACK OF SUBJECT-MATTER JURISDICTION

Ms. Symczyk's primary argument in opposition to Defendants' Motion is that even if the Offer moots her FLSA claim, this Court cannot dismiss her case because she allegedly represents a group of potential plaintiffs. More specifically, she asserts that purported Rule 23 class action policy insulates her from Defendants' Motion to Dismiss. Although she acknowledges that the Third Circuit has not squarely addressed the issue in the context of the FLSA, she asserts that the reasoning set forth in *Weiss v. Regal Collection*, 385 F.3d 337 (3d Cir. 2004), a Rule 23

case, applies with equal force to purported FLSA collective actions. She is wrong.[1]

As an initial matter, *Weiss* (a nonbinding decision) is distinguishable. *Weiss* addresses whether a Rule 68 offer made to the named plaintiff before filing an answer rendered putative class claims under the Fair Debt Collection Practices Act moot. It is distinguishable for at least two reasons. First, in contrast to the situation here, the offer did not provide complete relief. *Id.*, at 342 (explaining that "the Rule 68 offer did not provide the maximum damages to the putative class."). Second, as numerous courts have explained, the Rule 23 class action principles expounded upon in *Weiss* are of no help to Ms. Symczyk. They are fundamentally different from, and mutually exclusive of, principles governing litigation under Section 216(b) of the FLSA. Indeed, even *Weiss* recognizes that it is the named plaintiff's class representative role which impacts the Rule 68 analysis:

> As sound as is Rule 68 when applied to individual plaintiffs, its application is strained when an offer of judgment is made to a class **representative**. . . . [A]llowing the defendants here to 'pick off a **representative plaintiff** with an offer of judgment less than two months after the complaint is filed may undercut the viability of the class action procedure, and frustrate the objectives of

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[1] Ms. Symczyk appears to chide Defendants for not referencing *Weiss* in their Opening Brief. Defendants did not cite *Weiss* by name, however, because there is no need. Its reasoning simply does not apply in FLSA actions. Regardless, Defendants clearly noted exceptions to the mootness doctrine under Rule 23, even stating they expected Plaintiff to rely on them erroneously.

> this procedural mechanism for aggregating small claims, .."

Weiss, 385 F.3d at 342 (emphasis added). This excerpt reveals precisely why *Weiss* and its reasoning have no application to FLSA cases. Specifically, concerns regarding putative class members in Rule 23 class actions are not properly incorporated into the FLSA collective action analysis.

First, the FLSA does not recognize representative or class actions. Accordingly, "representative plaintiffs" do not exist under the FLSA. When Congress first adopted the opt-in model for collective actions in 1947 through the Portal-to-Portal Act, it did so expressly intending to eliminate the possibility of opt-out (Rule 23) class actions. *See* Portal-to-Portal Act of 1947, pt. IV, § 5, 61 Stat. 84, 87, 88 (1947); *see also* 29 U.S.C. § 216(b) ("No employee shall be a party plaintiff to any such action **unless** he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.") (emphasis added). Tellingly, the title which Congress assigned to the relevant statutory provision, "Representative Actions Banned," illustrates well that Congress's purpose in adding the opt-in language to FLSA collective actions was to prohibit precisely what is allowed under Rule 23 – a plaintiff seeking to pursue claims on a representative basis, *i.e.* on behalf of absent putative class members. Pub. L. 49, ch. 52 § 61 Stat. 84, 87 (1947). Congress explained that without a ban on representative class actions like those addressed in Weiss, "the courts of the country would be burdened with excessive and needless litigation." Employers would be faced with "vast allegations of liability . . . brought on behalf of employees who had no real involvement in, or knowledge, of the lawsuit."

Portal-to-Portal Act of 1947 § 1(a)(7), codified at 29 U.S.C. § 251(a)(7); *see also Hoffman-La Roche, Inc. v. Sterling*, 493 U.S. 165, 173 (1989)("[t]he relevant [1947] amendment was for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions."); *Arrington*, 531 F. Supp. at 501 ("[T]he purpose of the ban on representative actions was to prevent large group actions; with their vast allegations of liability, from being brought on behalf of employees who had no real involvement in, or knowledge of the lawsuit."); *Bartels v. Piel Bros.*, 74 F. Supp. 41, 44 (E.D.N.Y. 1947) (same). In short, by enacting Section 216(b), Congress intended to prohibit resolution of FLSA claims by any means other than direct adjudication.[2] Accordingly, refusing to dismiss Ms. Symczyk's FLSA claim would contravene Congress's intent.

Second, *Weiss* notes the policy interest in ensuring that Rule 68 offers of judgment do not frustrate Rule 23's interest in promoting the aggregation of small claims. No such policy interests exist under the FLSA. The FLSA, although a remedial statute, envisions individual – mid not representative – claims. It requires active and affirmative participation by claimants, and entitles each claimant to an award of

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[2] Although the FLSA does not permit representative actions, the statute provides multiple avenues of relief for aggrieved employees. The FLSA allows individual employees, on their own or by opting in to a collective action, to recover unpaid wages, an additional amount of liquidated damages (equal to the unpaid wages) where appropriate, and a mandatory award of costs and reasonable attorneys' fees to a prevailing plaintiff. *See* 29 U.S.C. § 216(b). An aggrieved employee may also file a claim with the United States Department of Labor, which has authority to advocate on behalf of the employee. 29 § 216(c).

attorney's fees and costs, as well as liquidated damages, upon a successful result. 29 U.S.C. § 216(b). FLSA claimants simply need not concern themselves, as the court did in *Weiss*, with the relative size of the claim and/or allocating fees and costs among a large group. *Weiss*, 385 F.3d at 344-345. This is because FLSA claimants are amply compensated in each case for all unpaid wages, damages, fees and costs. Moreover, any suggestion that putative claimants cannot prosecute their own actions is belied by reality. The last ten years have seen an explosion of wage and hour litigation. Thus, not only is no one deterred from litigating wage and hour claims, but court-filing statistics demonstrate that a ready and willing supply of lawyers exists to handle these fee-shifting cases.

For these reasons, among others, most courts have refused to extend *Weiss* to FLSA cases. For example, in rejecting the identical argument Ms. Symczyk makes here, the court in *Darboe* explained:

> . . . [*Weiss*] is distinguishable because it was decided in the context of a class action maintained pursuant to Rule 23 of the Federal Rules of Civil Procedure ("Rule 23") and not, as here, an FLSA collective action commenced pursuant to 29 § 216(b). In a Rule 23 action, once a class is certified, all those falling within the description of the class certified are deemed a part of the case and will be bound by the outcome unless they take the affirmative action of opting out of the matter. *See* FRCP 23(c)(2)(13) (setting forth notice to class members as to procedure for exclusion from the class). In contrast, an FLSA collective action requires members of the class to take the affirmative step of "opting in" to the

> action to be a part of the action and bound by its terms. Where no class member has opted in to the collective action, the named plaintiff is deemed to represent himself only. In such cases, application of Rule 68 to moot a single plaintiff's claim creates no conflict with the policy underlying the collective action procedure.

Darboe v. Goodwill Indusits. of Greater N.Y. & Northern NJ, Inc., 485 F. Supp. 2d 221, 223-24 (E.D.N.Y. 2007) (citing *Vogel*, 371 F. Supp. 2d at 127; *Ward*, 455 F. Supp. 2d, at 267)).

Because *Weiss* is of little moment in an FLSA case, courts confronted with solitary individuals claiming to represent a collection of plaintiffs under the FLSA routinely dismiss such cases when those individuals are presented with an offer of judgment that meets or exceeds their possible demands. In dismissing such cases, courts concern themselves with three issues: (1) does the offer of judgment fully satisfy the plaintiff's claim; (2) is a motion for conditional certification pending; and (3) have additional plaintiffs stepped forward to join in the claim. *See Briggs v. Arthur T. Mot. Real Estate LLC*, 2006 U.S. Dist. LEXIS 82891, *6-7 (E.D.N.Y. 2006) ("While the Second Circuit ha[s] not ruled on the issue of mootness when an offer of judgment is made in an FLSA collective action, other courts have" and "[i]n those cases where no other similarly situated individuals have opted in and the offer of judgment satisfies all damages of the plaintiff, plus all costs and attorney's fees, the courts have held that a Rule 68 offer of judgment moots an FLSA collective action thereby depriving the court of subject matter jurisdiction.") citing *Ward*, 2006 U.S. Dist. LEXIS 75665, 2006 WL 2925650, at *4-6; *Vogel*,

371 F. Supp. 2d 122, 128 (D. Conn. 2005); *Mackenzie*, 276 F. Supp. 2d 1211, 1213 (M.D. Fla. 2003).

Where, as here, there is no contention that the Offer does not fully satisfy the claim; no one has opted-in to the action; and no motion for conditional certification is pending, courts have not hesitated to dismiss FLSA claims for lack of subject matter jurisdiction. Indeed, every case Ms. Symczyk cites for the proposition that dismissal is inappropriate only refused to dismiss the action when at least one of these three conditions was not met, *i.e.*, where it was unclear whether the Rule 68 offer fully satisfied the plaintiff's claims, where others had opted-in to the action, or where the plaintiff had already filed a motion for conditional certification under Section 216(b).[3] Because only Ms. Symczyk's individual claim

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[3] *See, e.g.*, *Nash v. CVS Caremark Corp., et al*, 2009 U.S. Dist. LEXIS 109437 (D. RI. Nov. 16, 2009) (denying motion to dismiss purported FLSA collective action based on offer of judgment to named plaintiff where four individuals had opted-in to case and offer did not moot their claims); *Bowens v. Atl. Maint. Corp.*, 546 F. Supp. 2d 55, 58 (E.D.N.Y. 2008) (denying motion to dismiss based on offer of judgment where a motion for conditional certification was pending and clear evidence existed at outset of case that other individuals were interested in joining case as six employees opted-in but later withdrew); *Yeboah v. Central Parking System*, 2007 WI, 3232509 (E.D.N.Y. Nov. 1, 2007) (additional individual opted-in to action while motion to dismiss pending); *Rubery v. ButhNa-Bodhaige, Inc.*, 494 F. Supp. 2d 178 (W.D.N.Y. 2007) (more than fifty consent forms filed by putative collective action members); *Robles v. Celestica Corp.*, 627 F. Supp. 2d 1008 (D. Minn. 2007) (denying motion to dismiss FLSA collective action based on offer of judgment served after motion for conditional certification was filed and other individuals had sought to join case); *Guerra v. Big Johnson Concrete Pumping, Inc.*, 2006 WL 2290517 (S.D. Fla. June I6, 2006) (declining to find FLSA action moot where another employee opted-in to case at time defendant made offer of judgment); *Morales-Aracadio v.*

is at stake, and Defendants' Offer represents all that she could hope to recover (and more) through litigation, her claim is moot. There is simply no justification for taking the time of the Court, Defendants and Ms. Symczyk in further pursuit of a claim that Defendants have satisfied fully in Ms. Symczyk's favor.

II. THE RELATION BACK DOCTRINE DOES NOT SAVE PLAINTIFF'S CASE FROM DISMISSAL.

Implicitly recognizing that her individual claim is moot, Ms. Symczyk asserts that this Court's inquiry should not stop there. She argues that the "relation back" doctrine under Fed. R. Civ. P. 23, as applied in *Weiss*, should operate with equal force in this FLSA case, and thus save her claim from dismissal. Rule 23's relation back doctrine, however, has no application under Section 216(b) of the FLSA.

Shannon Produce Farms, 237 F.R.D. 700 (S.D. Ga. 2006) (denying motion to dismiss where defendant served offer of judgment after court certified collective action and authorized notice to be sent to similarly situated employees); *Geer v. Challenge Financial Investors Corp.*, 2006 WL 704993 (D. Kan. Mar. 14, 2006) (stating dismissal inappropriate where third plaintiff gave notice to court of her intent to opt-in after first two plaintiff had received offers of judgment and court was uncertain that amount offered fully satisfied claims at issue); *Reyes v. Carnival Corp.*, 2005 U.S. Dist. LEXIS I1948, *8 (SD. Fla. May 25, 2005) (concluding live controversy existed where "there is no basis for [the court] to conclude that the offer of judgment is definitively more than the Plaintiff could recover at trial . . ." and two other individuals opted-in to case after offer made).

Although Ms. Symczyk argues otherwise, the logical underpinnings of the relation back doctrine hinge on concepts inapplicable to FLSA actions. Unlike FLSA putative claimants, Rule 23 putative class members are entitled to certain protections upon the filing of a class action complaint. The statute of limitations is tolled for all putative class members and, at least in Pennsylvania and certain other jurisdictions, putative Rule 23 class members are deemed represented by counsel upon filing of a class complaint, entitling them to certain fiduciary protections as well. *See Dondore v. NGK Metals, Inc.*, 152 F. Supp. 2d 662 (E.D. Pa. 2001). Thus, in a Rule 23 case, to the extent an early offer of judgment moots a putative class action, it potentially impacts the rights of all putative class members. The statute of limitations will no longer be tolled, and putative class members may need to take prompt and unexpected action to protect their rights. Consequently, the "picking off" of class plaintiffs about which the *Weiss* court and others seemingly express concern has actual consequences for absent putative class members.

In contrast, dismissal of an FLSA named plaintiff impacts the rights of no one other than the named plaintiff. The filing of the action tolls the limitations period for no one. If a court dismisses an alleged FLSA collective action, other claimants are free, as they always are, to file their own claim without prejudice to their rights. Although dismissing such claims may ultimately impact a court's interest in avoiding multiplicity of litigation, such an interest cannot, as a matter of law, give life to an otherwise moot claim. In other words, the Court's interest in avoiding repetitive litigation cannot create a case or controversy where by law none exists. *See Powell v. McCormack*, 395 U.S. 486, 496 (1969) (stating case

becomes root, and incapable of judicial resolution, "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."). Further, any such interest is minimized here because, despite the fact that this case has been pending for five months, not one other person has expressed any interest in participating.

Moreover, the relation back doctrine under Rule 23 should not apply in FLSA cases for other reasons as well. Named plaintiffs in Section 216(b) cases have no procedural right, independent of their own claims, in a collective action. As originally enacted in 1938, the FLSA allowed employees and others (such as unions) to sue in a "representative" capacity on behalf of unidentified employees, similar to actions brought under Rule 23. *Arrington v. NBC*, 531 F. Supp. 498, 500 (D.D.C. 1982). In the Portal-to-Portal Act of 1947, however, Congress deliberately amended Section 216(b) to bar such "representative actions." *See Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1248 (11th Cir. 2003) (per curiam) (citing *Arrington*, 531 F. Supp. at 500); *see also Portal-to-Portal Act of 1947*, ch. 52, §§ 5(a), 6, 7, 61 Stat.. 87-88; 93 Cong. Rec. 538, 2182 (1947) (remarks of Sen. Donnell). This is precisely why nowhere in the FLSA or any implementing regulation is the concept of "class certification" mentioned. Nor does the Supreme Court even mention the word "certification," or any variation of that word, in its seminal opinion expounding on opt-in actions, *Hoffmann-LaRoche, Inc. v. Sperling, et al*, 493 U.S. 165 (1989). Rather, the class certification (or "conditional certification") nomenclature, which courts seemingly apply to the FLSA, is judicially created; its use has no tie to the actual language in *Sperling*, Section 216(b) or any other FLSA provision. Indeed, the label "certification"

is entirely inappropriate under the FLSA because "the only real issue, is whether and whom the court should assist in providing notice of the action. That decision can be made without the gratuitous act of 'conditionally certifying' the class. . . ." Allan G. King and Camille C. Ozumba, *"Strange Fiction: The "Class Certification" Decision in FLSA Collective Actions,"* 24 Lab. Law 257 at 280 (Winter/Spring 2009). The wholesale adoption of class certification terminology by courts in FLSA cases, without considering the possible repercussions of the terms, has clearly lead to erroneous reasoning. This is no better exemplified than in *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913 (5th Cir. 2008), a case on which Ms. Symczyk's relation back argument relies.[4]

In *Sandoz*, while recognizing that the defendant's Rule 68 offer of judgment mooted plaintiff's claim, the court applied the "relation back doctrine," initially articulated in *Sosna v. Iowa*, 419 U.S. 393 (1975), to find that the plaintiff had standing to pursue collective certification of the alleged FLSA action notwithstanding her lack of personal interest in the claim. In doing so, however, the court erroneously applied Rule 23 concepts to claims under Section 216(b). The result is a flawed holding, the error of which is clear on the face of the opinion. Specifically, the *Sandoz* court states:

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[4] *Sandoz* actually supports Defendants' position that Ms. Symczyk's claim is moot. *See id.*, at 919 ("the language of § 216(h) and the cases construing that provision demonstrate that Sandoz cannot represent any other employees until they affirmatively opt-in to the collective action. This means that when Cingular made its offer of judgment, Sandoz represented only herself, and the offer of judgment fully satisfied her individual claims. If our analysis stopped there, Sandoz's case would be moot").

> The issue in this appeal is whether a FLSA claim becomes moot when the purported representative of a collective action receives an over that would satisfy his or her individual claim and no other plaintiffs have opted in to the collective action. Therefore, we must determine whether Sandoz represents only herself in this claim or if she also represents other similarly-situated employees in a FLSA collective action.
>
> * * *
>
> . . . the differences between class actions and *FLSA § 216(b)* collective actions do not compel a different result regarding whether a certification motion can 'relate back' to the filing of the complaint. . . . Although the differences between *Rule 23* class actions and *FLSA § 216(b)* collective actions alter the conceptual mootness inquiry, each type of action would be rendered a nullity if defendants could simply moot the claims as soon as the **representative** plaintiff riles suit. Thus, the policies behind applying the 'relation back' principle for *Rule 23* class actions apply with equal force to *FLSA § 216(b)* collective actions.

553 F.3d at 921 (emphasis added).

What is striking about both *Sandoz*'s framing of the issue, and its ultimate reasoning, is that the court grounds both in the erroneous assumption that an FLSA named plaintiff, at any point in the litigation, is a "representative" plaintiff. Plaintiffs in FLSA cases are NOT – at any point – representative plaintiffs, regardless of the procedural posture of the case.

Moreover, unlike class certification under Rule 23, "certification" as that term is commonly used under the FLSA, does not bind anyone – no one is "in" the case unless they affirmatively choose to be and it does not transform the FLSA action into a "representative" one, as with Rule 23 actions. This is because the FLSA is clear: representative actions are banned. *See* Pub. L. 49, ch. 52 § 61 Stat. 84, 87 (1947). Accordingly, the central premise underpinning the Sandoz ruling is simply erroneous.[5]

Rather, because a Section 216(b) plaintiff has no procedural right to represent others, a plaintiff's reliance on collective action allegations cannot provide a personal stake or interest that prevents dismissal of the case on mootness grounds. *See Cameron-Grant*, 347 F.3d at 1249; *Vogel v. Am. Kiosk Mgmt.*, 371 F. Supp. 2d 122, 128 (D. Conn. 2005). In *Cameron-Grant*, the Eleventh Circuit carefully analyzed this issue and reached the following conclusion: "[A] § 216(b) plaintiff . . . presents only a claim on the merits. In contrast to the Rule 23 plaintiff, a § 216(b) plaintiff has no claim that he is entitled to represent other plaintiffs. Accordingly, because [the plaintiff] has no remaining personal claims, this action is moot." 347 F.3d at 1249.

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[5] Ms. Symczyk cites *Nash v. CVS Caremark Corp., et al*, 2009 U.S. Dist. LEXIS 109437 (D.R.I. Nov. 16, 2009) as supporting application of the relation back doctrine in a case such as this. *Nash*, however, does not mention the doctrine or even cite *Weiss* or *Sandoz*. It fact, based on the facts here (no opt-ins and no pending certification motion), the *Nash* court concedes that First Circuit precedent would have compelled it to dismiss the plaintiff's claim as moot. *See Cruz v. Farquharson*, 252 F.3d 530 (1st Cir. 2001) (dismissing Rule 23 class action as moot where all named plaintiffs had received complete relief and no motion for class certification was pending).

In *Cameron-Grant*, after the district court denied class certification, the lone remaining plaintiff settled his FLSA claim but claimed "representative status" and sought to appeal that denial. The Eleventh Circuit considered first whether the plaintiffs claims on appeal were moot. It recognized that "Pin the Rule 23 class action context, . . . unique mootness principles may apply," and the named plaintiff, had he sought to certify a Rule 23 "representative" or "opt-out" class would have had standing to appeal the denial of a Rule 23 motion for class certification. 347 F.3d at 1244 (emphasis added); *see also id.* at 1245-47. While recognizing that a Rule 23 named plaintiff may act as a private attorney general and has "a procedural right to represent a class," the Eleventh Circuit held that an FLSA Section 216(b) plaintiff "has no claim that he is entitled to represent other plaintiffs." *Id.* at 1249. Thus, even in an alleged collective action, if an FLSA plaintiff has been "fully paid all claimed unpaid wages and overtime [wages], liquidated damages equal to that amount, and . . . costs and attorneys' fees" (*id.* at 1244), then the plaintiff "has no remaining personal claims, and [the] action is moot." *Id.* at 1249; *see also Simmons v. United Mortgage & Loan*, 2009 WL 2950879 at *3 (W.D.N.C. Sep. 14, 2009) (granting motion to dismiss after offer of judgment on FLSA claims rejected, despite fact that plaintiffs filed motion for conditional certification before motion to dismiss was filed, relying in part on the difference between Rule 23 class actions and ELSA collective actions: "The 'fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by FLSA § 16(b)' counsels against borrowing from the Rule 23 setting and imposing limitations on the offer of judg-

ment rule in the FLSA setting.") (quoting *Vogel*, 371 F. Supp. 2d at 127).[6]

In sum, because Ms. Symczyk has no procedural right to represent others, practical concerns regarding judicial efficiency and preserving the Congressional intent behind FLSA collective actions do not allow this case to survive application of the mootness doctrine. *See Geer*, 2006 WL 704993 at *8-9 (acknowledging that where no opt-ins exist, application of Rule 68 to moot a single plaintiff's claim creates no conflict with policy underlying collective actions); *see also Duffy v. Quattrocchi*, 576 F. Supp. 336, 342 (D.R.I. 1983) (stating absent personal stake in the outcome, plaintiffs policy argument could not save suit from dismissal on mootness grounds). There is, accordingly, no principled basis for this Court refraining from applying ordinary mootness rules and dismissing this case. *See Cameron-Grant*, 347 F.3d at

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[6] To the extent Ms. Symczyk argues that, as a matter of policy, this Court should not dismiss her claim because doing so undermines the FLSA's collective action device, that argument is of no moment where, as here, the plaintiff has no personal stake in the outcome of the action. Where a plaintiff's claims are moot, and her arguments are "pitched on policy considerations," "the courts cannot be placed in a position of issuing what would amount to advisory opinions . . . ." *See Duffy v. Quattrocchi*, 576 F. Supp. 336, 342 (D.R.I. 1983). Moreover, Ms. Symczyk's argument that this Court should allow her to proceed with a collective action without any remaining personal stake ignores the plain language of Section 216(b) and case law confirming that named plaintiffs in FLSA cases have no representative status or rights over the claims of others. *See also Brawn v. Sears Holdings Mom Corp.*, C.A. No. 1:09-cv-02203 (N.D. Ill. Aug. 17, 2009) (dismissing collective action allegations from case based on release, explaining "the mere fact that class actions are mentioned within § 216(b) does not create a 'right' for a plaintiff to bring a class action").

1240; *Ward v. Bank of N.Y.*, 455 F. Supp. 2d 262, 267 (S.D.N.Y. 2006); *see also Smith v. T-Mobile USA Inc.*, 570 F.3d 1119, 1123 (9th Cir. 2009) (dismissing case because plaintiffs' "acceptance of T-Mobile's offer of judgment when no other plaintiffs had opted in disposed of the only claims they could assert at that time").[7]

III. PLAINTIFF'S FAILURE TO MOVE FOR CONDITIONAL CERTIFICATION WITHIN NINETY (90) DAYS RENDERS THE RELATION BACK DOCTRINE INAPPLICABLE.

Even if this Court follows *Sandoz* (which it should not), the "relation back" doctrine announced does not save a plaintiff's moot putative collective action from dismissal in every instance. Indeed, the *Sandoz* court stated that "relation back is warranted only when the plaintiff files for certification 'without undue delay.'"[8] *Sandoz*, 553 F.3d at 921 (quoting *Weiss*, 385 F.3d at 348). In the instant case, five months have passed since Ms. Symczyk filed her complaint and she has yet to file a motion for conditional certification. Based on the Court's scheduling order, she does not intend to do so for at least another three months. Local Rule 23.1(c), however, mandates that parties seeking class

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[7] Although Ms. Symczyk claims *Cameron-Grant* does not squarely address the issue at bar (presumably because it belies her argument) (*see* Plf's Opp. at fn. 3), *Sandoz* identifies *Cameron-Grant* as the only other Circuit Court decision that "has addressed the same type of scenario currently before us." *Sandoz*, 553 F.3d at 917.

[8] Notably, the Fifth Circuit reversed and remanded to consider whether plaintiff timely sought certification of her collective action. If the district court concluded no, dismissal for lack of subject matter jurisdiction remained warranted. *Sandoz*, 553 F.3d at 921-922.

certification file such motions within ninety (90) days of filing a class action complaint. Although Local Rule 23 does not apply to "certification" motions under the FLSA, to the extent the Court considers applying Rule 23's relation back doctrine in this case, it is certainly prima facie evidence of Ms. Symczyk's undue delay in seeking collective certification.[9]

II. CONCLUSION

Defendants' Rule 68 Offer of Judgment affording Ms. Symczyk all relief she could potentially receive if ultimately successful mooted her FLSA claim. Not only is there no additional relief that Ms. Symczyk can recover, there is also no representative role Ms. Symczyk can pursue with respect to her FLSA claim. As a result, this Court should honor Congress's intent as stated in the Portal-to-Portal Act and dismiss the FLSA claim.

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[9] Ms. Symczyk half-heartedly argues that resolution of Defendants' Motion is premature because the Court has yet to review the Offer and determine that it is "fair and reasonable." Plf's Opp. at 16-17. This argument is misguided. The Offer is not a waiver of, or attempt to abridge, her FLSA rights; it is a judgment in Ms. Symczyk's favor, the sufficiency of which she does not contest. If she does not contest its reasonableness, why should or would the Court? Regardless, as she herself acknowledges, "'the Third Circuit has indicated that [wage) disputes may be settled privately, without court approval.'" *See Burke v. Wackenhut Corp.*, 2007 WL 694302, *2 (M.D. Pa. Mar. 5, 2007) (*citing Coventry v. United States Steel Corp.*, 856 F.2d 514, 521 n.8 (3d Cir. 1988).

Respectfully submitted,

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Date: April 30, 2010

CERTIFICATE OF SERVICE

I hereby certify that, on April 30, 2010, a true and correct copy of the foregoing **Defendants' Motion to Dismiss for Lack of Subject-Matter Jurisdiction and Supporting Memorandum** was filed and served *via CM/ECF* electronic filing, addressed to the following party:

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/s/ *James N. Boudreau*

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed: 05/14/10]

Case No. 2:09-cv-05782-MMB

LAURA SYMCZYK,
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION and ELDERCARE RESOURCES CORPORATION,
Defendants.

Honorable Michael M. Baylson
(Filed via Electronic Case Filing System)

DEFENDANTS' ANSWER AND STATEMENT OF AFFIRMATIVE AND ADDITIONAL DEFENSES TO PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendant Genesis HealthCare Corporation and Defendant ElderCare Resources Corporation (collectively "Defendants"), by and through their undersigned counsel, hereby file this Answer and Statement of Affirmative and Additional Defenses to Plaintiff's First Amended Complaint ("Amended Complaint"). Defendants respond to the correspondingly numbered paragraphs of the Amended Complaint as follows:

1. Admitted in part; denied in part. Defendants admit that Plaintiff purports to proceed as set forth in Paragraph 1. Defendants deny, however, that

this case is properly asserted as a collective action pursuant to 29 U.S.C. § 216(b) as defined by Plaintiff in this paragraph or otherwise, that Plaintiff has a valid cause of action in any respect, that Plaintiffs claims are similar to claims of the alleged putative plaintiffs, or that Plaintiff is otherwise entitled to any relief. To the contrary, Defendants have fully and properly compensated Plaintiff for all hours worked. Finally, Defendants deny that the class of alleged similarly situated plaintiffs is properly defined.

2. Admitted in part; denied in part. Defendants admit that Plaintiff purports to proceed as set forth in Paragraph 2. Defendants deny, however, that this case is properly asserted as a state-wide class action. Defendants further deny that Plaintiff has a valid cause of action in any respect, including under the Pennsylvania Minimum Wage Act ("PMWA"), as amended, 43 Pa. C.S.C. § 333.101-333.115, the Pennsylvania Wage Payment and Collection Law ("PWPCL"), 43 Pa. C.S.A. § 260.1 *et seq.*, or Pennsylvania common law, or that Plaintiff is otherwise entitled to any relief.

3. Admitted in part; denied in part. Defendants admit that Plaintiff purports to proceed as set forth in Paragraph 3. Defendants deny, however, that this case is properly asserted as a state-wide class action pursuant to Fed. R. Civ. P. 23(a) and (b) as defined by Plaintiff in Paragraph 3 or otherwise, that Plaintiff has a valid cause of action in any respect, that Plaintiff's claims are similar to claims of the alleged putative plaintiffs, or that Plaintiff is otherwise entitled to any relief. Defendants further deny that the class of alleged similarly situated plaintiffs is properly defined.

4. Admitted in part; denied in part. Defendants admit that Plaintiff purports to use the definitions set forth in Paragraph 4 throughout the Amended Complaint. Defendants deny, however, that the definition is proper, as this case is not properly asserted as a collective or class action, Plaintiff does not have a valid cause of action in any respect, Plaintiff's claims are not similar to claims of the alleged putative plaintiffs, and Plaintiff is not otherwise entitled to any relief. Defendants further deny that the class of alleged similarly situated plaintiffs is properly defined.

5, Denied.

6. Denied. Because neither named Defendant is Plaintiff's employer under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*. (the "FLSA"), this Court lacks subject matter jurisdiction over Plaintiff's claim according to the express terms of Section 216(b) of the FLSA.

7. The allegations contained in Paragraph 7 of Plaintiff's Amended Complaint set forth conclusions of law to which no responsive pleading is required.

8. The allegations contained in Paragraph 8 of Plaintiff's Amended Complaint set forth conclusions of law to which no responsive pleading is required.

9. Denied as stated. Defendants admit that the allegations contained in Plaintiff's Amended Complaint occurred in this District and that venue is therefore proper in this Court.

10. Admitted in part; denied in part. Defendants admit that Plaintiff is an adult and that from April 2007 to December 2007, she worked as a Registered Nurse at Pennypack Center. Defendants lack know-

ledge or information sufficient to form a belief as to the truth of the allegation concerning where Plaintiff currently resides, and therefore denies that allegation. Defendants also deny any and all remaining allegations contained in Paragraph 10 of Plaintiff's Amended Complaint.

11. Admitted in part; denied in part. Defendants admit that Plaintiff purports to proceed as set forth in Paragraph 11. Defendants deny, however, that such allegation is sufficient to comply with the requirements of Section 216(b) of the FLSA.

12. Denied as stated. Genesis HealthCare Corporation admits that, through various subsidiaries and affiliates, it offers a variety of healthcare services in more than 200 centers across 13 eastern states. Genesis HealthCare Corporation further states that it maintains its headquarters at 101 E. State Street, Kennett Square, Pennsylvania.

13. Denied.

14. Denied.

15. Denied.

16. Denied.

17. Denied.

18. Admitted in part; denied in part. Defendants admit that Plaintiff refers to Genesis HealthCare Corporation and Eldercare Resources Corporation jointly as Defendants in the Amended Complaint but Defendants deny that they are in fact proper Defendants in this action as they did not employ Plaintiff.

19. Denied.

20. Admitted in part; denied in part. Defendants admit that Plaintiff purports to proceed as set forth

in Paragraph 20. Defendants deny, however, that this case is properly asserted as a collective action, that Plaintiff has a valid cause of action in any respect, that Plaintiff's claims are similar to claims of the alleged putative plaintiffs, or that Plaintiff is otherwise entitled to any relief. Defendants further deny that the class of putative plaintiffs is properly defined.

21. Denied.

22. Denied.

23. Denied.

24. Denied.

25. Denied.

26. Denied.

27. Denied.

28. Denied.

29. Denied.

30. Denied.

31. Denied.

32. Denied.

33. Denied.

34. Denied.

35. Denied.

36. Denied.

37. Denied.

38. Denied.

39. Denied.

40. Admitted in part; denied in part. Defendants admit that the first sentence of Paragraph 40 reflects Plaintiff's belief. Defendants deny, however, that Plaintiff and/or any members of the putative collective or class groups are entitled to any amounts. The second sentence in Paragraph 40 sets forth conclusions of law to which no responsive pleading is required and Defendants therefore deny those allegations.

41. Paragraph 41 of Plaintiffs Amended Complaint is an incorporation paragraph. As a result, Defendants incorporate their prior responses to all preceding paragraphs by reference.

42. Admitted in part; denied in part. Defendants admit that Plaintiff purports to proceed as set forth in Paragraph 42. Defendants deny, however, that this case is properly asserted as a collective action pursuant to 29 U.S.C. § 216(b) or as a state-wide class action. Defendants further deny that Plaintiff has a valid cause of action in any respect, including under the FLSA, the PMWA, the PWPCL, or Pennsylvania common law, or that Plaintiff is otherwise entitled to any relief.

43. Admitted in part; denied in part. Defendants admit that Plaintiff purports to proceed as set forth in Paragraph 43. Defendants deny, however, that this case is properly asserted as a collective action pursuant to 29 U.S.C. § 216(b) as defined by Plaintiff in this paragraph or otherwise, that Plaintiff has a valid cause of action in any respect, that Plaintiff's claims are similar to claims of the alleged putative plaintiffs, or that Plaintiff is otherwise entitled to any relief. To the contrary, Defendants have fully and properly compensated Plaintiff for all hours worked. Finally, Defendants deny that the class of alleged similarly situated plaintiffs is properly defined.

44. Admitted in part; denied in part. Defendants admit that Plaintiff purports' to proceed as set forth in Paragraph 44. Defendants deny, however, that this case is properly asserted as a state-wide class action pursuant to Fed. R. Civ. P. 23 as defined by Plaintiff in Paragraph 44 or otherwise, that Plaintiff has a valid cause of action in any respect, that Plaintiff s claims are similar to claims of the alleged putative plaintiffs, or that Plaintiff is otherwise entitled to any relief. Defendants further deny that the class of alleged similarly situated plaintiffs is properly defined.

45. The allegations contained in Paragraph 45 of Plaintiff's Amended Complaint set forth conclusions of law to which no responsive pleading is required.

46. Denied.

47. Denied.

a. Denied.

b. Denied.

c. Denied.

d. Denied.

e. Denied.

f. Denied.

g. Denied.

h. Denied.

i. Denied.

48, Denied.

49. Denied.

50. Denied.

51. Denied.

52. Denied.

53. Denied.

54. Denied.

55. Denied.

56. Denied.

57. Denied.

58. Denied.

59. Denied.

60. Denied.

61. Paragraph 61 of Plaintiffs Amended Complaint is an incorporation paragraph. As a result, Defendants incorporate their prior responses to all preceding paragraphs by reference.

62. Denied.

63. Denied.

64. Denied.

65. Denied. By way of further response, neither named Defendant was Plaintiffs "employer" as the term is defined in the FLSA.

66. Denied.

67. Denied.

WHEREFORE, Defendants request judgment against Plaintiff:

> Dismissing Plaintiff's Amended Complaint on the merits and with prejudice;
>
> Awarding Defendants their attorneys' fees, costs, and disbursements; and
>
> Awarding such other relief as the Court deems just and equitable.

68. Paragraph 68 of Plaintiff's Amended Complaint is an incorporation paragraph. As a result, Defendants incorporate their prior responses to all preceding paragraphs by reference.

69. The allegations contained in Paragraph 69 of Plaintiff's Amended Complaint set forth conclusions of law to which no responsive pleading is required.

70. Denied.

71. Denied. By way of further response, neither named Defendant was Plaintiff's "employer" as the term is defined in the PMWA.

72. Denied.

73. Denied.

74. Denied.

WHEREFORE, Defendants request judgment against Plaintiff:

> Dismissing Plaintiff's Amended Complaint on the merits and with prejudice;
>
> Awarding Defendants their attorneys' fees, costs, and disbursements; and
>
> Awarding such other relief as the Court deems just and equitable.

75. The allegations contained in Paragraph 75 of Plaintiff's Amended Complaint set forth conclusions of law to which no responsive pleading is required.

76. The allegations contained in Paragraph 76 of Plaintiff's Amended Complaint set forth conclusions of law to which no responsive pleading is required.

77. Denied. By way of further response, neither named Defendant was Plaintiff's "employer" as the term is defined in the PWPCL.

78. Denied.

79. Denied.

80. Denied.

81. Denied.

WHEREFORE, Defendants request judgment against Plaintiff:

Dismissing Plaintiff's Amended Complaint on the merits and with prejudice;

Awarding Defendants their attorneys' fees, costs, and disbursements; and

Awarding such other relief as the Court deems just and equitable.

82. The allegations contained in Paragraph 82 of Plaintiff's Amended Complaint set forth conclusions of law to which no responsive pleading is required.

83. Admitted in part; denied in part. Defendants admit that Plaintiff purports to proceed as set forth in Paragraph 83. Defendants deny, however, that Plaintiff has a valid cause of action in any respect, that Plaintiff's claims are similar to claims of the alleged putative plaintiffs, or that Plaintiff is otherwise entitled to any relief.

84. Denied.

85. Denied.

86. Denied.

WHEREFORE, Defendants request judgment against Plaintiff:

Dismissing Plaintiff's Amended Complaint on the merits and with prejudice;

Awarding Defendants their attorneys' fees, costs, and disbursements; and

Awarding such other relief as the Court deems just and equitable.

AFFIRMATIVE AND ADDITIONAL DEFENSES

1. To the extent the Court finds that Defendants took any actions or omissions with respect to Plaintiff such acts or omissions concerning or affecting Plaintiff and the putative classes Plaintiff purports to represent were undertaken in good faith to comply with the FLSA and the PMWA and with reasonable grounds that the actions did not violate the FLSA or the PMWA, and were justified, proper, and lawful, and were taken without any intent to violate the FLSA or the PMWA.

2. To the extent Plaintiff's and/or putative class members' claims implicate the National Labor Relations Act and/or the Labor Management Relations Act, the doctrine of preemption bars Plaintiff's purported claims and the claims she seeks to assert on behalf of others.

3. To the extent Plaintiff seeks to enforce putative class members' rights under collective bargaining agreements to which she is not a party, Plaintiff lacks standing to pursue the purported claims in whole or in part. This defense may also apply to the purported claims of some or all of the potential members of the putative classes that Plaintiff purports to represent.

4. Plaintiff's purported claims and the claims she seeks to assert on behalf of others are barred in whole or in part by the doctrines of laches, waiver, release, accord and satisfaction, and/or unclean hands.

5. Plaintiff's purported claims are barred in whole or in part by Plaintiffs failure to mitigate her alleged damages and/or to the extent she failed to exercise reasonable diligence to avoid harm, insofar as Plain-

tiff failed to utilize internal complaint procedures available to her regarding the matters alleged in the Amended Complaint. This defense may also apply to the purported claims of some or all of the potential members of the putative class that Plaintiff purports to represent.

6. To the extent that discovery reveals that Plaintiff falsely reported her hours and there is no evidence that Defendants required the false reporting of hours; and no evidence that Defendants knew or should have known that Plaintiff was providing false information as to her hours, or to the extent discovery reveals that Plaintiff otherwise failed to follow Defendants' policies for reporting her hours, the doctrine of estoppel bars the claims asserted by Plaintiff. This defense may also apply to the purported claims of some or all of the potential members of the putative class that Plaintiff purports to represent.

7. Plaintiff's purported claims and the claims she seeks to assert on behalf of others are barred in whole or in part by Section 10 of the Portal-to-Portal Act, 29 U.S.C. § 259, because any acts or omissions giving rise to this action were done in good faith and in reliance on written administrative regulations, orders, rulings, interpretations and approvals of the Department of Labor.

8. Plaintiff's purported claims and the claims she seeks to assert on behalf of others are barred in whole or in part by Section 11 of the Portal-to-Portal Act, 29 U.S.C. § 260, because any acts or omissions giving rise to this action were done in good faith and with reasonable grounds for believing that the actions or omissions were not a violation of the FLSA or any other state or federal law.

9. To the extent that the period of time alluded to in the Amended Complaint, or the period of time alleged later in this action, predates the limitations period set forth in Section 6(a) of the Portal-to-Portal Act, 29 U.S.C. § 255(a), such claims are barred.

10. Plaintiff does not, and cannot, fairly and adequately represent the interests of the purported classes.

11. Certification of a collective action, as applied to the facts and circumstances of this case, would constitute a denial of Defendants' procedural rights and right to trial by jury, and to substantive and procedural due process, in violation of the Fourteenth Amendment of the United States Constitution.

12. Plaintiff's Rule 23 class claims are incompatible with her Rule 216(b) collective action claims. Accordingly, this Court should dismiss Plaintiff's Rule 23 class allegations with prejudice and allow Plaintiff to assert her wage and hour claim under Pennsylvania state law on an individual basis in this action.

13. Plaintiff is not entitled to equitable relief insofar as she has an adequate remedy at law.

14. Plaintiffs claims are barred to the extent Plaintiff and/or alleged similarly situated employees did not work more than forty (40) hours in any given work week and, therefore, are not entitled to overtime under § 207 of the FLSA.

15. Plaintiff and all alleged putative class members have been paid and/or received all wages and/or compensation due to them by virtue of their alleged employment.

16. This Court lacks subject matter jurisdiction over Plaintiff's claim to the extent that Defendants are not Plaintiff's "employer" as defined under the FLSA and the PMWA.

17. Plaintiff and the members of the putative collective action are not similarly situated.

18. This suit may not be properly maintained as a class action because: (1) Plaintiff failed to plead, and cannot establish, the necessary procedural elements for class treatment; (2) a class action is not an appropriate method for the fair and efficient adjudication of the claims described in the Amended Complaint; (3) common issues of fact or law do not predominate and, to the contrary, individual issues predominate; (4) Plaintiff's claims are not representative or typical of the claims of the putative class; (5) Plaintiff is not a proper class representative; (6) Plaintiff and her counsel of record are not adequate representatives for the alleged putative class; (7) Plaintiff cannot satisfy any of the requirements for class action treatment, and class action treatment is neither appropriate nor constitutional; (8) there is not a well-defined community of interest in the questions of law or fact affecting Plaintiff and the members of the alleged putative class; (9) the alleged putative class is not ascertainable, nor are its members identifiable; and (10) to the extent that the alleged putative class is ascertainable and its members are identifiable, the number of putative class members is too small to meet the numerosity requirement for a class action.

19. Defendants oppose class certification and dispute the propriety of class treatment. If the Court certifies a class in this case over Defendants' objections, then Defendants asserts the affirmative and other defenses set forth herein against each and every member of the certified class.

20. Plaintiff's claims are barred because Defendants fully performed and/or met its obligations, if any, to Plaintiff.

21. Plaintiff's Amended Complaint fails to state any facts that would entitle Plaintiff to recover any compensatory damages, liquidated damages, punitive damages, attorneys' fees, costs or equitable relief from Defendants.

22. Plaintiff's claims are barred to the extent Defendants are not Plaintiff's "employer" within the meaning of the FLSA and applicable state statutes.

23. At all times, Defendants acted toward Plaintiff in good faith and did not willfully violate any law or deprive Plaintiff of any right or benefit.

24. Plaintiff's alleged injuries were not proximately caused by any unlawful policy, custom, practice and/or procedure promulgated and/or tolerated by Defendants.

25. To the extent that Plaintiff's claims implicate the National Labor Relations Act and/or Labor Management Relations Act, the doctrine of preemption bars the purported claims of Plaintiff and those she seeks to represent.

26. Plaintiff's state statutory and common law claims are preempted by the FLSA and/or the availability of other exclusive state statutory remedies.

27. The absence of a written contract between Plaintiff and Defendants precludes her claim under the PWPCL.

28. To the extent any members of the putative collective action and/or classes have signed a release and/or waiver encompassing the claims alleged in Plaintiff's Amended Complaint, their claims are barred by that release and/or waiver.

Defendants reserve the right to assert any additional defenses they discover during the course of litigation.

WHEREFORE, Defendant Genesis HealthCare Corporation and Defendant ElderCare Resources Corporation request that this Court dismiss Plaintiffs Amended Complaint with prejudice; that it enter judgment in Defendants' favor and against Plaintiff on all counts; and that this Court award Defendants their costs and attorneys' fees incurred in defending this action and such other relief as it deems appropriate.

Respectfully submitted,

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Attorneys for Defendants
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Eldercare Resources Corporation

Date: May 14, 2010

CERTIFICATE OF SERVICE

I hereby certify that, on May 14, 2010, a true and correct copy of the foregoing **Defendants' Answer and Statement of Affirmative and Other Defenses to Plaintiff's Amended Complaint** was filed and served via CM/ECF electronic filing, addressed to the following party:

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/s/ James N. Boudreau

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed: 05/27/10]

Case No.: 2:09-cv-05782-MMB

LAURA SYMCZYK, an individual, on behalf of herself and others similarly situated,
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION and ELDERCARE RESOURCES CORPORATION,
Defendants.

Honorable Michael M. Baylson

Notice of Consent Filing

PLEASE TAKE NOTICE, that pursuant to 29 U.S.C. § 216, Plaintiff hereby files the attached Consent to Sue form for the following individual in the above-captioned action:

Symczyk, Laura

Dated: May 27, 2010

By: /s/ Gary F. Lynch

Gary F. Lynch
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Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2010, I caused a true and correct copy of the foregoing Notice of Consent Filing to be electronically filed with the Clerk of the Court. The Notice is available for viewing and downloading and will be served by operation of the Court's electronic filing system (CM/ECF) upon all counsel of record.

Dated: May 27, 2010

Respectfully submitted,

By: /s/ Gary F. Lynch

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed: 05/27/10]

Case No.: 2:09-cv-05782-MMB

LAURA SYMCZYK, an individual, on behalf of herself and others similarly situated,
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION and ELDERCARE RESOURCES CORPORATION,
Defendants.

Honorable Michael M. Baylson
Notice of Consent Filing

CONSENT TO BECOME A PARTY PLAINTIFF

1. As I expressly indicated in paragraph 13 of my complaint, I, Laura Symczyk, consent to sue as a Plaintiff in this action, pursuant to the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq*.

2. By my signature below, I hereby authorize counsel to prosecute the claims in my name and on my behalf, in this action, for Defendant's failure to pay overtime wages as required under federal law.

DATE: 5/19/10

BY: Laura Symczyk
Print Name

BY: Laura Symczyk
Signature

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed: 06/03/10]

Case No.: 2:09-cv-05782-MMB

LAURA SYMCZYK, an individual, on behalf of herself and others similarly situated,
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION and ELDERCARE RESOURCES CORPORATION,
Defendants.

Honorable Michael M. Baylson

STATEMENT OF PLAINTIFF'S COUNSEL REGARDING JURISDICTION

On, May 19, 2010, this Court issued a Memorandum and Order, wherein Plaintiff was ordered to file a brief regarding this Court's continuing jurisdiction over Plaintiff's state law claims in the event this Court grants defendant's currently pending motion to dismiss plaintiff's FLSA claim.

After consulting with defense counsel, and in reliance upon specific demographic data supplied by defendant, plaintiff hereby notifies the Court that she believes her state law claims properly fall within the "Home State Exception" to jurisdiction under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. 1332(d)(4) Accordingly, Plaintiff believes diversity jurisdiction pursuant to CAFA does not exist in this case.

Dated: June 3, 2010

Respectfully submitted,

By: /s/ Gary F. Lynch
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Attorneys for Plaintiff Laura Symczyk

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed: 06/09/10]

Case No.: 2:09-cv-05782-MMB

LAURA SYMCZYK, an individual, on behalf of herself and others similarly situated,
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION and ELDERCARE RESOURCES CORPORATION,
Defendants.

Honorable Michael M. Baylson

MOTION TO VACATE JUNE 10, 2010 CLASS CERTIFICATION MOTION DEADLINE DUE TO LACK OF SUBJECT MATTER JURISDICTION

In accordance with this Court's Order, dated May 19, 2010, Plaintiff Laura Symczyk ("Plaintiff") is required to submit for the Court's consideration a Motion for Class Certification of Plaintiff's state law claims pursuant to Fed. R. Civ. P.23 by June 10, 2010. However, for all the reasons set forth below and based upon recent submissions to the Court, Plaintiff does not believe this Court has original federal jurisdiction over her state law claims. Accordingly, and in order to conserve both the parties and the Court's resources, Plaintiff respectfully requests that this Court vacate that part of the May 19, 2010 Order requiring the filing of Plaintiff's motion for class certification. By way of background, Plaintiff believes

a brief recitation of the record is necessary and sets forth such facts below.

1. This lawsuit was commenced on December 4, 2009, as an "opt-in" collective action pursuant to the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201 et seq.

2. At the request of Defendants, the parties stipulated that Defendants would have until February 18, 2010 to answer or otherwise respond to the complaint.

3. Defendants filed their Answer on February 18, 2010.

4. On March 8, 2010, this Court conducted its initial case management conference with the parties, during which the parties discussed the scheduling of Plaintiff's motion for collective action notification pursuant to Section 216(b) of the FLSA. Also during this conference, Defendants indicated to the Court that they had served a Fed. R.Civ. P. 68 Offer of Judgment upon the Plaintiff on February 18, 2010.

5. On March 10, 2010, this Court entered an Order, providing the parties with an "initial ninety (90) day discovery period, at the close of which Plaintiff will move for conditional certification under § 216(b) of the FLSA." The March 10 Order also indicated that, "[f]ollowing the Court's ruling on the certification motion, the Court will allow an additional six (6) month discovery period, to commence at the close of any Court-ordered opt-in window."

6. On March 23, 2010, Defendants filed their motion to dismiss for lack of subject matter jurisdiction, asserting that, because Plaintiff had not accepted the offer of judgment, her claim was now moot.

7. On March 29, Defendants removed to federal court a related state court complaint which plaintiff had filed in the Philadelphia County Court of Common Pleas, alleging violations of the Pennsylvania Minimum Wage Act of 1968 ("MWA"), 43 Pa. C.S.A. §333.101-333.115, the Pennsylvania Wage Payment and Collection Law ("WPCL"), 43 Pa. C.S.A. §260.1 et seq., and Pennsylvania common law (hereinafter collectively, the "State Law Claims"), and based upon the same factual allegations regarding Defendants' pay practices. This removed action was assigned to this Court and docketed at No. 10-1378.

8. On April 5, 2010, this Court scheduled a case management conference for April 7, 2010 for both actions (No. 09-5782 and No. 10.1378).

9. During the April 7, 2010 conference, the parties discussed with the Court the various possible ways to handle the removed action (No. 10-1378). At that time, Plaintiffs counsel indicated that Plaintiff had not yet determined whether she would seek to remand the State Law Claims. In response to the Court's question to Plaintiff's counsel as to why the State Law Claims were not initially alleged in this case, Plaintiff's counsel indicated that Plaintiff was concerned that Defendants might challenge the inclusion of such Fed. R.Civ.P. 23 "opt-out" claims in the same case as the FLSA "opt-in" claims. However, Plaintiff's counsel noted that Plaintiffs analysis of the issue was being informed, at least to some extent, by the United States Supreme Court's recent decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, __U.S.__, 130 S.Ct. 1431 (March 31, 2010).

10. As a result of the April 7 conference, this Court, on April 8, 2010, issued an Order scheduling another

case management conference for May 3, 2010 and instructing the parties to confer on whatever case management issues remained at that time, depending upon whether Plaintiff had chosen to seek remand of the State Law Claims.

11. On April 15, 2010, the parties, after conferring on the issues, filed a stipulation, pursuant to which Plaintiff would voluntarily dismiss the removed action (No. 10-1378) and would amend the complaint in this case to include the State Law Claims. The stipulation also provided that the filing of the amended complaint would not "moot or otherwise affect" Defendants' motion to dismiss. The purpose for this stipulation was to consolidate the FLSA and State Law Claims into the same action, as the Court had suggested during the April 7 conference, and to preserve the motion to dismiss, so that the litigation could proceed without the Defendants having to re-file such motion.

12. Pursuant to the stipulation, Plaintiff subsequently filed an amended complaint in this action, adding the State Law Claims, and voluntarily dismissed the removed action (No. 10- 1378).

13. On May 17, 2010, this Court held another case management conference, during which this Court instructed the parties to "stand down" on all discovery because the Court would shortly be issuing its decision regarding the motion to dismiss. At that time, both parties had depositions scheduled and, consistent with the Court's instruction, cancelled such depositions.

14. On May 19, 2010, this Court issued its Memorandum Re: Motion to Dismiss For Lack of Subject Matter Jurisdiction, wherein this Court indicated:

> The Court has tentatively concluded that Defendants' Rule 68 offer of judgment moots this collective action, and thus, that this collective action should be dismissed for lack of subject matter jurisdiction. In that event, the Court would likely decline, in its discretion, to exercise supplemental jurisdiction over Symczyk's claims under Pennsylvania law, which can be re-filed in state court. Although Symczyk will be given an opportunity to justify continued federal jurisdiction under Rule 23, the Court expresses doubt as to whether Symczyk can make such a showing, because the Rule 23 allegations in the case are limited to the state law claims, and Rule 23 does not itself confer jurisdiction.

15. Concurrently with its May 19, 2010, Memorandum, this Court issued an Order instructing the Plaintiff to file a brief "in support of continued federal jurisdiction and a motion to certify a class under Federal Rule of Civil Procedure 23, by June 10, 2010." Prior to this date, no discovery or briefing schedule regarding Plaintiff's state law claims, or the class certification of such claims, was ever entered by the Court.

16. In response to the Court's May 19 Memorandum and Order, the parties conferred regarding the potential basis for original federal subject matter jurisdiction over the State Law Claims. As a result of those discussions, Defendants provided Plaintiff with detailed demographic data which demonstrated that, while some members of the putative class may be citizens of a state other than Pennsylvania, the "Home State Exception" to diversity jurisdiction under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d) would apply because significantly

more than two-thirds of the putative class were citizens of Pennsylvania.

17. Consequently, and consistent with this Court's instruction and indication in its May 19, 2010 Memorandum and Order, Plaintiffs filed, on June 3, 2010, a Statement of Counsel indicating that Plaintiff did not believe there exists an independent basis for continued federal jurisdiction over the State Law Claims, absent the exercise of supplemental jurisdiction.

18. On June 8, 2010, Defendants' counsel delivered a letter to the Court indicating that Defendants similarly do not believe there exists an independent basis for federal jurisdiction over the State Law Claims.

19. Plaintiff believes that the recent submissions by the parties conceding that there is no basis for continued federal jurisdiction over the State Law Claims fulfills the requirements of this Court's instructions to the parties in its May 19, 2010 Memorandum and Order. Accordingly, unless and until this Court determines that it will exercise supplemental jurisdiction over the State Law Claims (which it indicated that it was disinclined to do in its May 19, 2010 Memorandum and Order), the lack of original jurisdiction by the Court seemingly obviates the need for Plaintiff to file her motion to certify a Rule 23 class action for the State Law Claims.

20. Out of an abundance of caution, however, Plaintiff is hereby moving to vacate the deadline for her motion for class certification until after this Court decides Defendants' motion to dismiss and, relatedly, whether it intends to exercise supplemental jurisdiction over the State Law Claims. Should the Court decide to exercise supplemental

jurisdiction over Plaintiff's State Law Claims, Plaintiff respectfully requests a conference with the Court so as to permit the parties the opportunity to caucus and submit a proposed discovery and briefing schedule on said claims.

Dated: June 9, 2010

Respectfully submitted,

Respectfully submitted,

_____

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed: 06/09/10]

Case No.: 2:09-cv-05782-MMB

LAURA SYMCZYK, an individual, on behalf of herself and others similarly situated,
Plaintiff,

v.

GENESIS HEALTHCARE CORPORATION and ELDERCARE RESOURCES CORPORATION,
Defendants.

Honorable Michael M. Baylson

ORDER

AND NOW, this ____ day of _____ 2010, upon consideration of Plaintiff's Motion to Vacate June 10, 2010 Class Certification Motion Deadline Due to Lack of Subject Matter Jurisdiction, IT IS HEREBY ORDERED that said motion is GRANTED. The June 10, 2010 deadline for Plaintiff to file her motion for class certification pursuant to Fed.R.Civ.P. 23 is hereby vacated.

_____ J.

CERTIFICATE OF SERVICE

I hereby certify that on this the 4th day of October, 2010, that the foregoing Volume II of the Joint Appendix was served on counsel of record via the Court's electronic filing system and on the following by overnight commercial carrier (Federal Express):

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I also certify that on 4th day of October, 2010, four bound copies of the Volume II of the Joint Appendix were served by mailing through a third party commercial carrier (Federal Express) to the Office of the Clerk, United States Court of Appeals for the Third Circuit.

/s/ Gary F. Lynch

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed: 12/02/2010]

CASE NO. 10-3178

LAURA SYMCZYK, Individually and
on behalf of all others similarly situated
Plaintiff-Appellant,

vs.

GENESIS HEALTHCARE CORPORATION and
ELDERCARE RESOURCES CORPORATION,
Defendants-Appellees.

**Appeal from the United States District Court
For the Eastern District of Pennsylvania in
Civil Action No. 09-5782
Michael M. Baylson,
United States District Judge**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1, Defendants-Appellees Genesis HealthCare Corporation and Elder-Care Resources Corporation disclose that no publicly held company owns 10% or more of its or their stock.

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF THE ISSUES

A. Whether the District Court properly dismissed Plaintiff-Appellant Laura Symczyk's claim under the federal Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* (the "FLSA") for lack of subject matter jurisdiction where it was undisputed that: (1) the Rule 68 Offer of Judgment presented to her satisfied all of her damages, including costs and attorneys' fees; (2) no other individuals had joined the case; and (3) she had not filed a motion to authorize notice to similarly situated claimants pursuant to § 216(b) of the FLSA?

B. Whether the District Court properly ruled that the relation back principles applied in Rule 23 class actions, as set forth in *Weiss v. Regal Collection*, 385 F.3d 337 (3d Cir. 2004), do not apply in this putative FLSA collective action where: (1) the Rule 68 Offer of Judgment satisfied the named plaintiff's individual claim in its entirety; (2) no other individuals had joined the case; and (3) there was no pending motion to authorize notice to similarly situated claimants pursuant to § 216(b) of the FLSA?

STATEMENT OF RELATED CASES OR PROCEEDINGS

This case has not previously been before this Court, and Defendants-Appellees are not aware of any other case or proceeding that is related, completed, pending or about to be presented before this Court or any other state or federal court or agency.

STATEMENT OF THE CASE

On December 4, 2009, Plaintiff-Appellant Laura Symczyk ("Ms. Symczyk") filed this lawsuit alleging that Defendants-Appellees Genesis HealthCare Corporation and ElderCare Resources Corporation[1] (collectively, "Genesis" or "Appellees") violated the FLSA by failing to pay her wages and overtime for all hours worked.[2] (J.A. 18, Collective Action Complaint ¶ 38). She purported to bring this case as a collective action under § 216(b) of the FLSA on behalf of "all persons who, at any time during the past three years and up until the date of entry of judgment are or were employed by Defendants . . . and whose pay was subject to an automatic meal break deduction even when those persons performed compensable work during such unpaid 'meal break.'" (J.A. 18, Collective Action Complaint ¶1).

On February 18, 2010, Appellees filed their Answer and Affirmative Defenses. They also served Ms. Symczyk with an Offer of Judgment (the "Offer") under Fed. R. Civ. P. 68 that provided Ms. Symczyk complete relief for all her alleged damages. (*See* J.A.

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[1] As Appellees have consistently noted throughout this litigation, Ms. Symczyk improperly named Genesis HealthCare Corporation and Eldercare Resources Corporation as Defendants in this case. Neither entity employed her. Rather, at all times, Ms. Symczyk worked for Encare of, Pennypack, Inc., a subsidiary many layers removed from its ultimate parent, Genesis HealthCare Corporation.

[2] The day before, December 3, 2009, Ms. Symczyk filed a complaint against the Appellees in the Philadelphia Court of Common Pleas. In that state court action, Ms. Symczyk asserted state law claims based on the same alleged conduct as in this federal action.

50, Appellees' Rule 68 Offer of Judgment).[3] The Offer provided a gross payment of $7,500.00 for all wages, benefits, and other monetary damages allegedly owed to Ms. Symczyk, including liquidated damages under the FLSA. *Id.* The Offer also allowed for an additional amount to pay reasonable attorneys' fees, costs and expenses incurred by Ms. Symcyzk in bringing her claims, as determined by the District Court. *Id.* Ms. Symczyk did not dispute the adequacy of the Offer, or that it provided relief beyond that which she could recover if she succeeded at trial. Nevertheless, Ms. Symczyk did not respond to the Offer, effectively rejecting it. *See* Fed. R. Civ. P. 68(a).

On March 8, 2010, the District Court held a Rule 16 scheduling conference. On March 11, 2010, the District Court issued a Scheduling Order. (J.A. 38, Scheduling Order). That Order directed the parties to commence discovery and Ms. Symczyk to file a motion to authorize notice to the putative collective group pursuant to § 216(b) of the FLSA no later than June 10, 2010. *Id.*

On March 23, 2010, Appellees filed a Motion to Dismiss the action for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). (J.A. 39, Motion to Dismiss for Lack of Subject Matter Jurisdiction). By their Motion, Appellees explained that the lawsuit was now moot because they had

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[3] The District Court dismissed Ms. Symczyk's action pursuant to Fed. R. Civ. P. 12(b)(1). Where, as here, a motion to dismiss for lack of subject matter jurisdiction is based on facts outside the pleadings, the court is free to weigh and evaluate any evidence that bears on the jurisdictional dispute. *Mortensen v. First Federal Savings and Loan Assoc.*, 549 F.2d 884, 891-893 (3d Cir. 1977). This determination can occur at any stage of the proceeding. *Id.*, at 891-892.

already offered Ms. Symczyk all that she could possibly recover in the lawsuit. *Id.* Consequently, there was no longer a viable case or controversy, and the Court lacked jurisdiction. Ms. Symczyk opposed Appellees' Motion to Dismiss, (J.A. 64, Brief in Opposition to Motion to Dismiss).

On March 29, 2010, Appellees removed Ms. Symczyk's related state court action to the United States District Court for the Eastern District of Pennsylvania. Thereafter, on April 13, 2010, the parties jointly filed a Proposed Stipulated Order providing that Ms. Symczyk would voluntarily dismiss her removed state action, and amend her Complaint in this action to include her state law claims. (J.A. 60, Proposed Stipulated Order), The Court entered the parties' proposed Order (J.A. 62, Stipulation and Order) and, thereafter, Ms. Symczyk filed her Amended Complaint. (J.A. 83, First Amended Class/ Collective Action Complaint). On May 14, 2010, Appellees filed their Answer to the Amended Complaint. (J.A. 114, Answer to Amended Complaint).

On May 19, 2010, the District Court granted Appellees' Motion to Dismiss, dismissing the FLSA claim, explaining:

> Symczyk does not contend that other individuals have joined her collective action. Thus, this case, like each of the district court cases cited by Defendants, which concluded that a Rule 68 offer of judgment mooted the underlying FLSA collective action, involves a single named plaintiff. In addition, Symczyk does not contest Defendants' assertion that the Rule 68 offer of judgment fully satisfied her claims. . . .

(J.A. 3, May 19, 2010 Memorandum). The Court then required Ms. Symczyk to submit her position regarding whether an independent basis for the Court's jurisdiction existed with respect to her state law claims. (J.A. 3, May 19, 2010 Memorandum and J.A. 13, May 19, 2010 Order).

On June 24, 2010, after receipt of Ms. Symczyk's written acknowledgement that no independent jurisdictional basis existed over her state law claims, the District Court declined to exercise supplemental jurisdiction over them, dismissed them without prejudice in accordance with 28 U.S.C. § 1367(c), and thereafter closed the case. (J.A. 16, June 24, 2010 Order). On July 19, 2010, Ms. Symczyk filed her Notice of Appeal of the District Court's decision. (J.A. 1, Notice of Appeal). Ms. Symczyk never filed a motion seeking collective certification under §216(b) of FLSA. Nor did anyone other than Ms. Symczyk ever join this action.

STATEMENT OF FACTS

From April 2007 to December 2007, Ms. Symczyk worked as a Registered Nurse at Pennypack Center, a long-term care facility owned by a Genesis subsidiary. (J.A. 18, Collective Action Complaint, ¶ 12). During the seven (7) months that Ms. Symczyk worked at Pennypack Center, she earned $30.00 per hour for regular time and $45.00 per hour for all hours worked in excess of forty (40) in a week. (J.A. 50, Appellees' Rule 68 Offer of Judgment).

On December 4, 2009, Ms. Symczyk filed this lawsuit. She claims that Appellees violated the FLSA by implementing an automatic meal break deduction policy pursuant to which they deducted thirty (30) minutes of work time per shift in excess of six (6)

hours. Although the United States Department of Labor has expressly endorsed employers' use of such policies, Ms. Symczyk baldy alleges that Genesis always deducted thirty (30) minutes from her pay, even on those days when she did not receive a meal break. (J.A. 18, Collective Action Complaint, ¶¶16-32).

On February 18, 2010, Appellees served Ms. Symczyk with a Rule 68 Offer. (J.A. 50, Appellees' Rule 68 Offer of Judgment). That Offer provided Ms. Symczyk complete relief for all her alleged damages. *Id.* In deriving the Offer, and solely for that purpose, Appellees construed the Complaint's allegations and made every assumption in Ms. Symczyk's favor, including that: (1) Ms. Symczyk worked at the Pennypack Center from April 2007 through December 2007 (the "Alleged Damages Period"); (2) during the Alleged Damages Period, Ms. Symczyk was paid $30.00 per hour for regular time and $45.00 per hour for overtime hours; (3) Ms. Symczyk worked and was not compensated for 30 minutes each workday during the Alleged Damages Period; (4) she was entitled to receive credit for the maximum available damages under the FLSA; and (5) she was entitled to receive reasonable attorneys' fees, costs and expenses incurred in bringing her claims, as determined by the District Court. *Id.* Within these parameters and based on Ms. Symczyk's time records, Appellees calculated her maximum possible recovery in this litigation to be: 68 overtime hours at $45.00 an hour = $3,060.00 and 13 regular hours at $30.00 an hour = $390.00 for a total of $3,450.00. *Id.* To account for alleged liquidated damages, Appellees doubled this amount for a total of $6,900.00. *Id.* The Offer was in the total amount of $7,500.00, plus reasonable attorneys' fees, costs and expenses which the District Court would determine. Ms. Symczyk did not respond to Appellees' Offer.

SUMMARY OF THE ARGUMENT

The District Court dismissed Ms. Symczyk's FLSA claim on mootness grounds. Specifically, because Appellees had presented Ms. Symczyk with an Offer of Judgment that gave her all that she could possibly recover, the sufficiency of which Ms. Symczyk did not contest, the District Court properly concluded that Ms. Symczyk no longer had a personal stake in the lawsuit and that it therefore lacked subject-matter jurisdiction.

Even though Ms. Symczyk acknowledges that the Offer of Judgment mooted her individual claim, and that SHE no longer has a cognizable interest in the case, she insists the District Court erred when it dismissed her case. She argues that because she filed her FLSA claim not only on behalf of herself, but on behalf of other similarly situated employees, the District Court erred in not treating her case on the same footing as a Rule 23 class action, *i.e.*, by applying the "relation back" as in *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004). In Mr. Symczyk's view, this supposed error allowed Appellees to use a Rule 68 Offer to "pick her off" to the detriment of other putative claimants. According to Ms. Symczyk, the District Court should have let her move for conditional certification of a putative FLSA collective action before dismissing her case.

Ms. Symczyk is wrong. In dismissing her FLSA claim, the District Court rejected and/or distinguished each argument she reasserts on appeal, and ruled that on the facts present here, "relation back" principles simply do not save her FLSA claim from dismissal. In so ruling, the District Court distinguished *Weiss* and other non-binding precedent, and aptly noted that every case that has refused to

dismiss a putative FLSA collective action where the named-plaintiff's claim was moot, had done so because one or more of the following factors was present: (1) other individuals had already joined the case; (2) there was a dispute as to whether the Rule 68 offer fully satisfied the plaintiff's claims; or (3) the plaintiff had already filed a motion for conditional certification under § 216(b) at the time the claim was mooted. Because none of these factors was present in this case, the District Court properly dismissed it for lack of subject matter jurisdiction. The District Court was right to reject Ms. Symczyk's effort to use relation back principles and attending policy considerations to create jurisdiction where none in fact exists.

ARGUMENT

I. The District Court Properly Dismissed Plaintiff's Complaint For Lack of Subject-Matter Jurisdiction Because It Is Undisputed That Appellees' Offer of Judgment Mooted Ms. Symczyk's Claim.

Article III of the United States Constitution limits the jurisdiction of federal courts to "actual cases and controversies." U.S. Const. Art. III Sec. 2; *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968). "When the issues presented in a case are no longer 'live' or the parties lack a legally cognizable interest in the outcome, the case becomes moot and the court no longer has subject matter jurisdiction." *Weiss*, 385 F.3d at 340. Thus, it is generally accepted that once a defendant offers a plaintiff all that she could hope to recover in litigation, the plaintiff loses her personal stake in the outcome and the district court loses subject-matter jurisdiction. *Id.*, *citing Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991) ("Once the defendant

offers to satisfy the plaintiffs entire demand, there is no dispute over which to litigate and a plaintiff who refuses to acknowledge this loses outright, under *Fed. R. Civ. P. 12(b)(1)*, because he has no remaining stake.") (internal citation omitted).

Relying on these long-established principles, the District Court dismissed this action. It had no choice but to do so. Ms. Symczyk was the only claimant, and the Offer provided her full relief. Because she no longer had a personal interest in the outcome, the District Court lacked jurisdiction.

On appeal, Ms. Symczyk essentially concedes that the Offer mooted her individual FLSA claim. She argues, however, that the District Court still should not have dismissed her case because she allegedly represents a group of similarly situated plaintiffs. She asserts that the reasoning set forth in *Weiss*, 385 F.3d at 337, a putative class action filed under Fed. R. Civ, P. 23, applies with equal force to collective actions under the FLSA and precludes a finding of mootness. Tacitly acknowledging that *Weiss* is not controlling (because this is admittedly not a Rule 23 class action), Ms Symczyk urges this Court to extend *Weiss* to FLSA actions, and allow her to litigate her anticipated motion for conditional certification under § 216(b) of the FLSA despite that fact that she no longer has a personal interest in this case. Doing so, she argues, will further policies underlying the "relation back" doctrine.

A. *Weiss* Is Not Controlling And Did Not Preclude The District From Dismissing This Action On Mootness Grounds.

Weiss addressed whether a Rule 68 offer made to the named plaintiff before filing an answer rendered

putative Rule 23 class claims under the Fair Debt Collection Practices Act ("FDCPA") moot. Concerned about the possibility that a FDCPA defendant could "pick off" a named Rule 23 plaintiff by "mak[ing] a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint," 385 F.3d at 348, this Court decided that, "absent undue delay in filing a motion for class certification," *id*, the two rules could be appropriately reconciled by allowing the class action process "to 'play out' according to the directive of Rule 23[.]" *Id*. So long as the plaintiff filed a "timely" motion for class certification, the motion would "relate back" to the filing of the complaint, thereby ensuring continued jurisdiction despite the Rule 68 offer.[4]

As the District Court here implicitly found, however, and numerous other courts have explained, the Rule 23 class action principles expounded upon in *Weiss* do not apply in FLSA cases. Indeed, each Supreme Court case that *Weiss* relies on, and *Weiss* itself, make clear that they were not permitting cases in which there was no Article III case or controversy to proceed. Rather, each ruling was dependent on a finding that a Rule 23 class representative whose individual claim becomes moot retains a "personal stake" in the class certification decision sufficient to satisfy Article III's adversity requirement. Thus, in *United States Parole Comm'n v. Geraghty*,. 445 U.S.

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[4] In so ruling, this Court distinguished those instances where a plaintiff voluntarily settles a case from those in which a plaintiff has refused a defendant's offer of judgment that fully satisfies the plaintiff's claim. *Weiss*, 385 F.3d at 349-50. This Court stated that "relation back" is more appropriate in the latter setting, as the defendant's unilateral action mooted the plaintiffs case. *Id*. at 350.

388 (1980), "the Court looked beyond the mootness of Geraghty's substantive claims and focused on his distinct 'procedural . . . right to represent a class.'" *Weiss*, 385 F.3d at 343 (*citing Geraghty*, 445 U.S. at 390). The action was not moot upon the expiration of the substantive claim, "because the plaintiff retained a 'personal stake' in the class certification decision." *Id.* Although the narrow holding in *Deposit Guaranty Nat. Bank Jackson, Miss. v. Roper*, 445 U.S. 326 (1980) is inapplicable here,[5] it was also dependent upon a finding that a putative class representative possesses an individual interest in the class certification decision. Justice Rehnquist, in his concurring opinion, stated:

> "[t]he action is moot in the Art. III sense only if this Court adopts a rule that an individual seeking to proceed as a class representative is required to accept a tender of only his individual claims. So long as the court does not require such acceptance, the individual is required to prove his case and the requisite Art. III adversity continues. Acceptance [of defendant's offer] need not be mandated under our precedent since the defendant has not offered all that has been requested in the complaint (i.e. relief for the class). . . .

Roper, 445 U.S. at 341.

This Court's holding in *Weiss* is grounded in the same principle: because of the unique obligations and responsibilities visited on a Rule 23 class representa-

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[5] "Difficult questions arise as to what, if any, are the named plaintiffs' responsibilities to the putative class *prior* to certification; this case does not require us to reach these questions." *Roper*, 445 U.S. at 340, n.12 (*emphasis in original*).

tive, he or she possesses an interest in the case beyond his or her own individual claim; he or she also has an interest for Article III purposes in the class certification decision itself. *See Weiss*, 385 F.3d at 347 ("The mootness exception recognizes that, in certain circumstances, to give effect to the purposes of Rule 23, it is necessary to conceive of the named plaintiff as a part of an indivisible class and not merely a single adverse party even before the class certification question has been decided.").

Indeed, *Weiss* makes clear that it is the named plaintiff's unique status as a Rule 23 class representative which impacts the Rule 68 analysis:

> As sound as is Rule 68 when applied to individual plaintiffs, its application is strained when an offer of judgment is made to a **class representative.** . . . [A]llowing the defendants here to 'pick off a **representative plaintiff** with an offer of judgment less than two months after the complaint is filed may undercut the viability of the class action procedure, and frustrate the objectives of this procedural mechanism for aggregating small claims, ..."

Weiss, 385 F3d at 344 (emphasis added).

In contrast to Rule 23 class actions, however, "representative plaintiffs" do not exist under the FLSA. When Congress first adopted the opt-in model embodied in § 216(b) of the FLSA in 1947, it did so expressly intending to eliminate the possibility of opt-out (Rule 23) class actions. *See Portal-to-Portal Act of 1947*, pt. IV, § 5, 61 Stat. 84, 87, 88 (1947); *see also* 29 U.S.C. § 216(b) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such

consent is filed in the court in which such action is brought.") (emphasis added). Tellingly, the title which Congress assigned to the relevant statutory provision, "Representative Actions Banned," illustrates well that Congress' purpose in adding the opt-in language to the FLSA was to prohibit precisely what is allowed under Rule 23 — a plaintiff seeking to pursue claims on a representative basis, *i.e.* on behalf of absent putative class members. Pub. L. 49, ch. 52 § 61 Stat. 84, 87 (1947). *See also Hoffman-La Roche, Inc. v. Sterling*, 493 U.S. 165, 173 (1989) ("[t]he relevant [1947] amendment was for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions."); *Arrington v. Nat. Broadcasting Co., Inc.*, 531 F. Supp. 498, 501 (D.C.D.C.) ("[T]he purpose of the ban on representative actions was to prevent large group actions, with their vast allegations of liability, from being brought on behalf of employees who had no real involvement in, or knowledge of, the lawsuit."); *Bartels v. Piel Bros.*, 74 F. Supp. 41, 44 (E.D.N.Y. 1947) (same). In short, by enacting § 216(b), Congress intended to prohibit resolution of FLSA claims by any means other than direct adjudication.[6]

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[6] Although the FLSA does not permit representative actions, it provides ample incentive for individuals to bring claims. The FLSA allows individual employees, on their own or by opting in to a collective action, to recover unpaid wages, an additional amount of liquidated damages (equal to the unpaid wages) where appropriate, and a mandatory award of costs and reasonable attorneys' fees to a prevailing plaintiff. *See* 29 U.S.C. § 216(b). An aggrieved employee may also file a claim with the United States Department of Labor, which has authority to advocate on behalf of the employee. 29 U.S.C. § 216(c).

It is therefore clear that a plaintiff like Ms. Symczyk, who files a putative collective action under § 216(b), has no representative role. Thus, when such a plaintiff is offered all possible relief on her individual claim, she in fact receives all that she possibly can in the litigation. Unlike a putative Rule 23 class representative, she is not legally entitled to pursue claims on behalf of anyone else and therefore retains no ongoing interest in the action. The actual case or controversy needed to support subject matter jurisdiction simply does not exist.

Those courts which have recognized that FLSA collective actions are not representative actions have rightly refused to extend *Weiss* to FLSA cases. For example, in rejecting the identical argument Ms. Symczyk makes here, the court in *Darboe* explained:

> . . . [*Weiss*] is distinguishable because it was decided in the context of a class action maintained pursuant to Rule 23 of the Federal Rules of Civil Procedure ("Rule 23") and not, as here, an FLSA collective action commenced pursuant to 29 U.S.C. § 216(b). In a Rule 23 action, once a class is certified, all those falling within the description of the class certified are deemed a part of the case and will be bound by the outcome unless they take the affirmative action of opting out of the matter. See FRCP 23(c)(2)(B) (setting forth notice to class members as to procedure for exclusion from the class). In contrast, an FLSA collective action requires members of the class to take the affirmative step of "opting in" to the action to be a part of the action and bound by its terms. Where no class member has opted in to the collective action, the named plaintiff is deemed to represent himself only. In such cases,

> application of Rule 68 to moot a single plaintiff's claim creates no conflict with the policy underlying the collective action procedure.

Darboe v. Goodwill Indusits. of Greater N.Y. & Northern NJ, Inc., 485 F. Supp. 2d 221, 223-24 (E.D.N.Y. 2007) (citing *Vogel v. American Kiosk Management*, 371 F. Supp. 2d 122, 128 (D. Conn. 2005); *Ward v. Bank of N.Y.*, 455 F. Supp. 2d 262, 267 (S.D.N.Y. 2006)).

Ms. Symczyk dismisses the significant distinctions between Rule 23 class and § 216(b) collective actions. She asserts that because *Weiss* cites *Lusardi v. Xerox Corp.*, 975 F.2d 964 (3d Cir. 1992), which also involved § 216(b) of the FLSA (albeit for age discrimination), this Court did not intend to draw any distinctions between Rule 23 class and § 216(b) collective actions in regard to "relation back" principles.[7] (Appellant's Br., at 20). Ms. Symczyk's assumption, however, is unwarranted. *Lusardi* concerned a narrow procedural issue. Specifically, the *Lusardi* plaintiff's were trying to expand *Geraghty's* narrow exception to the mootness rule. *Geraghty* provides that when a district court erroneously denies a class certification motion, which, if correctly decided, would have prevented the action from becoming moot in the first instance, an appeal lies from that denial and the corrected ruling "relates back" to the date of the original denial. In

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[7] In *Lusardi*, the district court initially denied class certification pursuant to Fed. R. Civ. P. 23(b). It then granted conditional certification of an opt-in class under the ADEA. Xerox appealed the grant of conditional certification pursuant to § 216(b), and this Court dismissed it for lack of jurisdiction. Unlike orders on class certification under Rule 23, which are subject to Fed. R. Civ. P. 23(f), orders entered pursuant to § 216(b) are non-final orders generally not subject to immediate appeal. *See Lusardi v. Xerox Corp.*, 747 F.2d 174 (3d Cir. 1984).

such an instance, the named plaintiff's attempt to represent the class is justifiable because, at the time he moved for class certification, he possessed an interest in the outcome of the case. As this Court held in *Lusardi*, however, there is no legal basis to apply *Geraghty* where, as here, the named plaintiff's individual claims became moot before any application for class certification. *Lusardi*, 975 F.2d at 983. Consequently, to the extent *Lusardi* applies, it is only to demonstrate that the District Court correctly determined that Ms. Symczyk's claim is moot and deserving of dismissal.

Because *Weiss* and its progeny are of little moment in an FLSA case, courts confronted with solitary individuals claiming to represent a collection of plaintiffs under the FLSA generally dismiss such cases where, as here, those individuals are presented with an offer of judgment that meets or exceeds their possible demands. In dismissing such cases, most courts, as the District Court did, have concerned themselves with three issues: (1) does the offer of judgment fully satisfy the plaintiff's claim; (2) is a motion for conditional certification pending; and (3) have additional plaintiffs stepped forward to join in the claim. *See Briggs v. Arthur T Mott Real Estate LLC*, C.A. No. 06-0468, 2006 WL 3314624, *3-4 (E.D.N.Y. Nov. 14, 2006)[8]; *Vogel*, 371 F. Supp. at 128; *Mackenzie v. Kindred Hospitals East, LLC*, 276 F. Supp. 2d 1211, 1213-1214 (M.D. Fla. 2003). In the absence of any these conditions, courts routinely dismiss putative FLSA collective claims for lack of subject matter jurisdiction. *See Briggs*, 2006 WL 3314624, *2 ("While the Second Circuit ha[s] not

[8] Copies of all unreported cases can be found in Appellees' Addendum in alphabetical order.

ruled on the issue of mootness when an offer of judgment is made in an FLSA collective action, other courts have" and "[i]n those cases where no other similarly situated individuals have opted in and the offer of judgment satisfies all damages of the plaintiff, plus all costs and attorney's fees, the courts have held that a Rule 68 offer of judgment moots an FLSA collective action thereby depriving the court of subject matter jurisdiction."), *citing Ward*, 455 F. Supp. 2d at 267.

Indeed, as the District Court expressly noted, every case Ms. Symczyk cites for the proposition that dismissal is inappropriate only refused to dismiss the action when at least one of the above three conditions was not met.[9] Because only Ms. Symczyk's individual

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[9] *See, e.g., Nash v. CVS Caremark Corp., et al.*, 683 F. Supp. 2d 195 (D. R.I. 2010) (denying motion to dismiss purported FLSA collective action based on offer of judgment to named plaintiff where four individuals had opted-in to case and offer did not moot their claims); *Bowens v. Atl Maint. Corp.*, 546 F. Supp. 2d 55, 59-60 (E.D.N.Y. 2008) (denying motion to dismiss based on offer of judgment where a motion for conditional certification was pending and clear evidence existed at outset of case that other individuals were interested in joining case as six employees opted-in but later withdrew); *Yeboah v. Central Parking System*, C.A. No. 06-0128, 2007 WL 3232509 (E.D.N.Y. Nov. 1, 2007) (additional individual opted-in to action while motion to dismiss pending); *Rubery v. Buth-Na-Bodhaige, Inc.*, 494 F. Supp. 2d 178 (W.D.N.Y. 2007) (more than fifty consent forms filed by putative collective action members); *Robles v. Celestica Corp.*, 627 F. Supp. 2d 1008 (D. Minn. 2007) (denying motion to dismiss FLSA collective action based on offer of judgment served after motion for conditional certification was filed and other individuals had sought to join case); *Guerra v. Big Johnson Concrete Pumping, Inc.*, C.A. No. 05-14237, 2006 WL 2290517 (S.D. Fla. June 16, 2006) (declining to find FLSA action moot where another employee opted-in to case at time defendant made offer of judgment); *Morales-Aracadio v. Shannon Produce Farms*, 237

claim was at stake; because she did not contest the sufficiency of Appellees' Offer; and because she had not filed any motion under § 216(b) of the FLSA, the District Court properly found her claim moot and dismissed the action.

B. No Persuasive Reason Exists to Extend Weiss to FLSA Collective Claims.

Recognizing that the Third Circuit has never extended Rule 23 "relation back" principles explained in *Weiss* to FLSA "collective actions," Ms. Symczyk argues that it should notwithstanding the admitted differences between the collective and class action devices. Just as she did in the District Court, Ms. Symczyk relies heavily on *Sandoz v. Cingular Wireless*, LLC, 553 F.3d 913 (5th Cir. 2008).[10] The District

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F.R.D. 700 (S.D. Ga. 2006) (denying motion to dismiss where defendant served offer of judgment after court certified collective action and authorized notice to similarly situated employees); *Geer v. Challenge Financial Investors Corp.*, C.A. No. 05-1109, 2006 WL 704933 (D. Kan. Mar. 14, 2006) (stating dismissal inappropriate where third plaintiff gave notice to court of her intent to opt-in after first two plaintiffs had received offers of judgment and court was uncertain that amount offered fully satisfied claims); *Reyes v. Carnival Corp.*, C.A. No. 04-21861, 2005 WL 4891058, *3 (S.D. Fla. May 25, 2005) (concluding live controversy existed where "there is no basis for [the court] to conclude that the offer of judgment is definitively more than the Plaintiff could recover at trial . . ." and two other individuals opted-in to case after offer made).

[10] As in the District Court, Ms. Symczyk also relies heavily on a District of Rhode Island case, *Nash v. CVS Caremark Corp., et al.*, 683 F.Supp.2d 195 (D.R.I. 2010), as supporting application of relation back principles here. That case, however, is inapposite. It did not find that the plaintiff whose claim has been mooted by an offer of judgment had the requisite personal stake in the case to sustain continued jurisdiction. Rather, the court relied on the fact that four individuals had joined the case since

Court, however, expressly declined to follow Sandoz because of its different procedural posture (a motion for conditional certification was pending at the time of appeal) and the fact that it did not discuss the factors courts routinely consider when analyzing mootness in the FLSA context. (Order, at p. 8, fn. 6). The District Court was right to reject *Sandoz*.

In *Sandoz*, the defendant gave an offer of judgment shortly after the plaintiff commenced an FLSA collective action. The plaintiff did not accept the offer, and the defendant moved to dismiss the case. The district court denied the defendant's motion, rejecting the argument that a make-whole offer to a named plaintiff in a FLSA collective action divests the court of subject matter jurisdiction. The district court agreed, however, to certify an interlocutory appeal on the issue. 553 F.3d at 915. On appeal, the Fifth Circuit concluded that a named-plaintiff in a putative FLSA collective action represents only herself (at least until the point when someone else affirmatively joins the case). Because the defendant's offer fully satisfied the plaintiff's individual claim, it therefore mooted her case.[11] *Id.*, at 919. The Fifth Circuit, however, did not stop there. It proceeded to express

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the defendants had filed their motion to dismiss. It was the interests of these opt-ins, and not the plaintiff, that sustained subject matter jurisdiction to hear plaintiff s motion for conditional certification under the FLSA. Indeed, the Nash court concedes that First Circuit precedent would have compelled it to dismiss the plaintiff's case on the facts here (no opt-ins and no pending certification motion). *Id*, at 196; *see Cruz v. Farquharson*, 252 F.3d 530 (1st Cir. 2001) (dismissing Rule 23 class action as moot; all named plaintiffs had received complete relief and no class certification motion pending).

[11] Thus, *Sandoz* supports the District Court's finding that Ms. Symczyk's claim is moot. *See id.*, at 919.

concern that traditional mootness principles "provide an incentive for employers to use Rule 68 as a sword, 'picking off representative plaintiffs and avoiding ever having to face a collective action." *Id.* To avoid this, the Fifth Circuit latched on to the "relation back" principles articulated in *Weiss*, and held that when a FLSA plaintiff files a timely motion for certification of a collective action (which opportunity the court should provide), that motion relates back to the date the plaintiff filed the initial complaint thereby overcoming any mootness challenges. *Id*, at 920-21.

Even a cursory read of *Sandoz* makes clear that its reasoning is flawed. For example, in explaining its holding, the Fifth Circuit stated:

> If the court ultimately grants the motion to certify, then the Rule 68 offer to the individual plaintiff would not fully satisfy the claims of everyone in the collective action; if the court denies the motion to certify, then the Rule 68 offer of judgment renders the individual plaintiff's claims moot.

Id., at 921. Further, when explaining the affect of its holding, the Fifth Circuit stated:

> If [the plaintiff timely sought certification of a collective action], then her motion relates back to the filing of her initial state court petition. Further, if the court ultimately grants the certification motion, then [the defendant's] Rule 68 offer of judgment only to [the plaintiff] did not moot the case. Conversely, if the court denies the certification motion, then [the plaintiff] still represents only herself, and [the defendant's] Rule 68 offer of judgment rendered the case moot."

Id.

What these passages demonstrate is that despite its long explication of the differences between Rule 23 class and FLSA collective action procedures, the Fifth Circuit did not fully appreciate them. Its ultimate holding is based on the erroneous assumption that if a court grants "conditional certification" under § 216(b) of the FLSA, the named plaintiffs status transforms from that of an individual claimant to a representative one, or that the putative "collective action" somehow obtains independent rights. Hence its references to the fact if the district court "certified a collective action," the offer of judgment to the individual plaintiff would not fully satisfy the claims of "everyone in the collective action," or, if the court declined to certify a collective action, the plaintiff would "still represent only herself." The act of "certifying a collective action" does not vest anyone with any rights much less add plaintiffs; it merely authorizes the sending of notice to putative claimants. Indeed, it is significant that nowhere in the FLSA or any implementing regulation is the concept of "class certification" even mentioned. The Supreme Court never mentions the word "certification," or any variation of it, in its seminal opinion expounding on opt-in actions, *Hoffmann-LaRoche, Inc. v. Sperling, et al.*, 493 U.S. 165 (1989). Rather, the "conditional certification" nomenclature, which courts routinely apply to the FLSA, is judicially created; its use has no tie to the actual language in *Sperling*, Section 216(b) or any other FLSA provision. Indeed, the label "certification" is entirely inappropriate under the FLSA because "the only real issue, is whether and whom the court should assist in providing notice of the action. That decision can be made without the gratuitous act of 'conditionally certifying' the class . . . ." Allan G. King

and Camille C. Ozumba, "*Strange Fiction: The "Class Certification" Decision in FLSA Collective Actions,*" 24 Lab. Law 257, 280 (Winter/Spring 2009). The wholesale adoption of class certification terminology by courts in FLSA cases, without considering the possible repercussions of the terms, has clearly lead to erroneous reasoning. This is no better exemplified than in *Sandoz*.[12]

Similarly, as explained above, unlike a Rule 23 class action, named plaintiffs in § 216(b) cases have no procedural right, independent of their own claims, in a collective action. Unlike class certification under Rule 23, "certification" under the FLSA does not transform the FLSA action into a "representative" one, as with Rule 23 actions. This is best exemplified by the Eleventh Circuit's analysis in *Cameron-Grant v. Maxim Health Care Svcs., Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003). In Cameron-Grant, the district court denied class certification, after which the lone remaining plaintiff settled his FLSA claim but claimed "representative status" and sought to appeal that denial. The Eleventh Circuit considered first whether the plaintiff's claims on appeal were moot. It recognized that "pin the Rule 23 class action context, . . . unique mootness principles may apply," and the named plaintiff, had he sought to certify a Rule 23 "representative" or "opt-out" class would have had standing to appeal the denial of a Rule 23 motion for class certification. *Cameron-Grant*, 347 F.3d at 1244 (emphasis added); *see also id.* at 1245-47. While recognizing that a Rule 23 named plaintiff

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[12] It is entirely possible that a court could certify an FLSA collective action, and have no one opt-in. In that scenario, the offer of judgment would moot the claim, but *Sandoz* would counsel against dismissal.

has "a procedural right to represent a class," the Eleventh Circuit held that an FLSA Section 216(b) plaintiff "has no claim that he is entitled to represent other plaintiffs." *Id.* at 1249. Thus, even in an alleged collective action, if an FLSA plaintiff has been "fully paid . . . all claimed unpaid wages and overtime [wages], liquidated damages equal to that amount, and . . . costs and attorneys' fees" (*id.* at 1244), then the plaintiff "has no remaining personal claims, and [the] action is moot." *Id.* at 1249.[13]

Accepting the procedural and substantive differences between Rule 23 class and § 216(b) collective actions, the rationale Ms. Symczyk articulates for extending relation back principles to FLSA cases is revealed for what it actually is: a device used to manufacture subject matter jurisdiction where none in fact exists. The Supreme Court surely did not envision that courts would use the very narrow relation back principles announced in *Geraghty* and *Roper* to eviscerate Article III's case or controversy requirement, or permit plaintiffs to litigate cases in which it is undisputed that they no longer have any individual interest. That is why the District Court was correct to reject *Sandoz* in favor of long-standing mootness principles, and focus its analysis

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[13] *See also Simmons v. United Mortgage & Loan*, 2009 WL 2950879 at *3 (W.D.N.C. Sep. 14, 2009) ("The 'fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by FLSA § 16(b)' counsels against borrowing from the Rule 23 setting and imposing limitations on the offer of judgment rule in the FLSA setting.") (quoting *Vogel*, 371 F. Supp. 2d at 127).

on whether Appellees' Offer of Judgment resolved Ms. Symczyk's claim in its entirety.[14]

II. Ms. Symczyk Policy Considerations Do Not Warrant Applying Rule 23's "Relation Back" Doctrine to FLSA Cases.

Ms. Symczyk further argues that, as a matter of policy, this Court should reverse the District Court. Affirming dismissal of her case she contends will promote the "picking off" of purported named plaintiffs in putative collective actions, undermining the FLSA's collective action device. As an initial matter, such arguments are of no moment where, as here, the plaintiff has no personal stake in the outcome of the action. Where a plaintiff's claims are moot, and her arguments are "pitched on policy considerations," "the courts cannot be placed in a position of issuing what would amount to advisory opinions. . . ." *See Duffy v. Quattrocchi*, 576 F. Supp. 336, 342 (D.R.I. 1983).

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[14] Even if this Court follows Sandoz (which it should not), application of "relation back" principles do not save a plaintiff's moot putative collective action from dismissal in every instance. "Relation back is warranted only when the plaintiff files for certification 'without undue delay.'" *Sandoz*, 553 F.3d at 921 (quoting Weiss, 385 F.3d at 348). In the instant case, five months passed since Ms. Symczyk filed her complaint and Genesis filed its Motion to Dismiss, and an additional two months passed while the District Court considered the Motion. Yet, Ms. Symczyk never filed a motion for conditional certification. Local Rule 23.1(c) mandates that parties seeking class certification file such motions within ninety (90) days of filing a class action complaint. Although Local Rule 23 does not apply to FLSA "certification" motions, to the extent the Court considers applying Rule 23 relation back principles to this case, it is certainly *prima facie* evidence of Ms. Symczyk's undue delay in seeking collective certification.

Even assuming that policy considerations alone can somehow generate the requisite Article III adversity (which they cannot), that is not the case here. The concerns articulated in Roper and Weiss on which Ms. Symczyk relies are largely grounded in Rule 23; they do not apply with the same force to FLSA claims. By deliberate design, the FLSA speaks of individual — and not representative — claims. It requires active and affirmative participation by claimants, and entitles each claimant to an award of attorney's fees and costs, as well as liquidated damages, upon a successful result. 29 U.S.C. § 216(b). FLSA claimants therefore need not concern themselves with the relative size of the claim and/or allocating fees and costs among a large group. *Weiss*, 385 F.3d at 344-345. Moreover, individual FLSA claimants are amply compensated for all unpaid wages, damages, fees and costs. Unlike a Rule 23 plaintiff, therefore, an FLSA plaintiff has no incentive to advocate, as Ms. Symczyk is, to continue to proceed in a collective form.

Any suggestion that putative claimants cannot prosecute their own actions is similarly belied by reality. The last several years have seen an explosion of wage and hour litigation. *See, e.g., Ellis v. Edward D. Jones & Co., L.P.*, 527 F. Supp. 2d 439, 459 n. 19 (W.D. Pa. 2007) (noting, inter alia, statistics showing 70% increase in FLSA federal case filings between 2000 and 2003). Clearly, no one is deterred from litigating wage and hour claims. Indeed, court-filing statistics demonstrate that a ready and willing supply of lawyers exists to handle these fee-shifting cases.

Ms. Symczyk further contends that allowing defendants to use Rule 68 offers to "pick off' named

plaintiffs in FLSA collective actions will enable employers to stall or avoid liability. What Ms. Symczyk labels "picking off," however, is in reality prompt payment of a disputed claim without lengthy and costly litigation. The FLSA not only envisions such a result but encourages it. The FLSA promotes employers to resolve disputes early, as the statute's fee-shifting provisions and liquidated damage provisions impose onerous penalties on employers who do not dispose of such claims promptly.

Moreover, early resolution of disputes via an offer of judgment promotes judicial efficiency, as cases resolve early thereby preventing and/or relieving judicial backlog. Indeed, that is the entire purpose of Rule 68. Courts should encourage such outcomes, permitting defendants to dispose of claims quickly versus allowing cases in which the named plaintiff no longer has any personal interest to proceed merely for the purpose of providing plaintiffs and their counsel more time to solicit additional claimants.[15]

Finally, to the extent FLSA plaintiffs desire not to be "picked off," they can readily avoid it. As *Weiss* notes, one way to avoid being "picked off" is for a putative class plaintiff who is served with a Rule 68 offer ofjudgment to move for class certification within the ten days allowed for response to the offer. *See Parker v. Risk Mgmt. Alternative, Inc.*, 204 F.R.D. 113, 115 (N.D. Ill. 2001); *Kremnitzer v. Cabrera & Rephen, P.C.*, 202 F.R.D. 239, 244 (N. D. Ill. 2001). Diligent plaintiffs can also avoid such a result by

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[15] The policy concerns Ms. Symczyk asserts regarding the "picking off' of plaintiffs does not even apply in this case. In the five and one-half months that her case was pending in the District Court, not one other individual joined her.

having others join the action or by challenging the sufficiency of the pending offer of judgment. Thus, a FLSA plaintiff who does not want to be "picked off" can avoid such an occurrence with relative ease. In light of this, such a concern simply does not justify continued litigation of an admittedly moot claim.

In sum, policy considerations, no matter how compelling, do not give Ms. Symczyk a personal stake in the litigation sufficient to support jurisdiction. Policy arguments simply cannot create a case or controversy when none in fact legally exists. Because Ms. Symczyk has no procedural right to represent others, practical concerns regarding judicial efficiency and preserving the Congressional intent behind FLSA collective actions do not allow this case to survive application of the mootness doctrine. There was, therefore, no principled basis on which the District Court could refrain from applying ordinary mootness rules and dismissing the case. *See Cameron-Grant*, 347 F.3d at 1240; Ward, 455 F. Supp. 2d at 267; *see also Smith v. T-Mobile USA Inc.*, 570 F.3d 1119, 1123 (9th Cir. 2009) (dismissing case because plaintiffs' "acceptance of T-Mobile's offer of judgment when no other plaintiffs had opted in disposed of the only claims they could assert at that time").[16] Accordingly, this Court should affirm the District Court.

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[16] The District Court distinguished *Cameron-Grant* on the grounds that it involved a voluntary dismissal of claims. (Order, at pp. 6-7, n.4). Nevertheless, *Sandoz* identifies Cameron-Grant as the only other Circuit Court decision that "has addressed the same type of scenario currently before us." *Sandoz*, 553 F.3d at 917.

III. The District Court Properly Dismissed The Case When It Did.

Ms. Symczyk's final argument contests the timing of the District Court's dismissal. She seems to argue that the District Court dismissed this case too quickly; it should have allowed the case to proceed for some period of time before dismissing it, presumably to provide an opportunity for some development to occur that might save her moot case from dismissal (such as another claimant joining the case). In an effort to bolster this argument, she contends that the Court never reviewed the sufficiency of the Offer to determine whether it was "fair and reasonable," and that that somehow undermines the validity of the District Court's dismissal. (Appellant's Br., at 27-29). Her arguments are misguided on several levels.

First, the Offer is not a waiver of, or attempt to abridge, her FLSA rights; it is a judgment in Ms. Symczyk's favor,[17] Second, she never challenged the sufficiency of the Offer below. If she did not contest its reasonableness, she is hard pressed to insist that the District Court erred in some way by failing to do it for her. Third, her argument utterly ignores the fact that if the District Court lacks subject matter jurisdiction, it cannot proceed.

In short, courts should not force defendants to continue to litigate claims that they have agreed to resolve by offering to pay all that is allegedly owed

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[17] Regardless, as Ms. Symczyk acknowledged before the District Court, "'the Third Circuit has indicated that [wage] disputes may be settled privately, without court approval.'" *See Burke v. Wackenhut Corp.*, 2007 WL 694302, *2 (M.D. Pa. Mar. 5, 2007) (*citing Coventry v. United States Steel Corp.*, 856 F.2d 514, 521 n.8 (3d Cir. 1988).

merely because the plaintiff is recalcitrant. Ms. Symczyk filed a claim against Genesis; Genesis opted to pay her everything she was due and then some; she chose to reject that offer even though she never contested its sufficiency. In the face of such facts, neither the Court, Ms. Symczyk nor Genesis is served by further litigation.

IV. CONCLUSION

For all the foregoing reasons, this Court should affirm the District Court's dismissal of this action for lack of subject matter jurisdiction.

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Rule 46.1 of the Local Appellate Rules for the United States Court of Appeals for the Third Circuit, James N. Boudreau, counsel for Appellees, certifies that he is a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), the undersigned counsel of record certifies this Brief of Appellees complies with the type and volume limitations of Fed. R. App. P. 32(a)(7)(B).

1. According to the word count in the word processing system employed in drafting this brief (Microsoft Word) the Brief of Appellees contains 6687 words, excluding the parts of the brief exempted by Fed. R. App. P.32 (a)(7)(B)(iii).

2. This Brief has been prepared using Microsoft Word in Times New Roman 14-point font.

/s/ James N. Boudreau

CERTIFICATE OF VIRUS CHECK

I further certify that the E-Brief was scanned for viruses using the Symantec anti-virus program.

/s/ James N. Boudreau

CERTIFICATE OF SERVICE

I; James N. Boudreau, attorney for Appellees/ Defendants, Genesis Healthcare Corporation and Eldercare Resources Corporation, hereby certifies that I submitted 10 copies of Appellees' Amended Brief and Addendum to the Court and filed the Amended Brief and Addendum with the Court's CM/ECF filing system on December 2, 2010.

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CERTIFICATE OF IDENTICAL COMPLIANCE OF BRIEFS

I also certify that the text of the hard copies and the E-Brief are identical.

/s/ James N. Boudreau

CASE NO. 10-3178

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LAURA SYMCZYK, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED
Plaintiff, Appellant,

v.

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORPORATION
Defendants, Appellees.

Appeal from the United States District Court
For the Eastern District of Pennsylvania
in Civil Action No. 09-5782
Michael M. Baylson,
United States District Judge

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ARGUMENT

I. REPRESENTATIVE PLAINTIFFS DO EXIST UNDER THE FLSA

In arguing that this Court's decision in *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004) should not be extended to FLSA collective action claims, Genesis Healthcare Corporation and Eldercare Resources Corporation (hereinafter collectively referred to as "Genesis") contend that "representative actions" were banned under the FLSA and, therefore, "representative plaintiffs" do not exist under the FLSA. (Appellees' Brief, pp. 15-17). In support of this proposition, Genesis cites to the Portal-to-Portal Act of 1947, 61 Stat. 87 (1947). However, as court interpretation and legislative history reveal, those amendments were enacted largely to limit actions brought by unions and nonemployee-agents purporting to act on behalf of a large group of employees. Notably, Congress left intact the "similarly situated" language in Section 216(b) providing for a collective action brought on a representative basis by an employee-plaintiff, like Symczyk here. Senator Donnell, Chairman of the Senate Judiciary Committee, explained the so-called "Ban on Representative Actions" as follows:

> It will be noted, therefore, Mr. President, that in those two classes of cases there is this difference: In the first case, an employee, a man who is working for the X steel company can sue for himself and other employees. We see no objection to that. But the second class of cases, namely, cases in which an outsider, perhaps someone who is desirous of stirring up litigation without being an employee at all, is permitted to be the plaintiff in the case, may result in very decidedly unwhole-

> some champertous situations which we think should not be permitted under the law.
>
> So section 8 amends the Fair Labor Standards Act by eliminating that portion of section 16(b) which permits employees to designate an agent or representative to maintain an action for and in behalf of all employees similarly situated.

93 Cong.Rec. 538, 2182 (1947)(Remarks of Senator Donnell). *See also Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989)("In part responding to excessive litigation spawned by plaintiffs lacking a personal interest in the outcome, the representative action by plaintiffs not themselves possessing claims was abolished [by the Portal-to-Portal Act of 1947], and the requirement that an employee file a written consent was added."); *Arrington v. National Broad. Co.*, 531 F.Supp. 498, 500-01 (D.D.C. 1982)(Portal-to-Portal Act barred unions from bringing representative actions pursuant to the FLSA); *United Food & Commercial Workers Union, Local 1564 of New Mexico v. Alberston's, Inc.*, 207 F.3d 1193, 1200 (10th Cir. 2000)(holding that "organizations, as opposed to groups of individual consenting employees, cannot be plaintiffs to damages actions under §216(b)").[1]

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[1] Indeed courts across the country have recognized the representative nature of FLSA actions. *See e.g. Carter v. Anderson Merchandisers, LP*, No. 08-25, 09-216, 2010 U.S. Dist. LEXIS 7793, *13 (C.D.Cal. Jan. 7, 2010)(collecting cases and noting that where the parties reach a settlement before certification, the court must make a "final class certification finding before approving a collective action settlement"); *see also Anderson v. Cagle's Inc.*, 488 F.3d 945, 953 (11th Cir. 2007) (noting that class certification of an FLSA action requires more than mere facts of job duties otherwise "it is doubtful that § 216(b) would further the interests of judicial economy, and it

Accordingly, contrary to Genesis' sweeping statement, representative actions are not banned under the FLSA.

II. THIS COURT'S DECISION IN *WEISS* WAS NOT DEPENDENT UPON A FINDING THAT A RULE 23 PLAINTIFF RETAINS A "PRESENT INTEREST" IN REPRESENTING THE PUTATIVE CLASS

Genesis claims that this Court's decision in *Weiss* is inapplicable to this FLSA collective action because the ruling in *Weiss* was somehow dependent upon a finding that a Fed.R.Civ.P. 23 class representative, whose individual claim is mooted, retains a "personal stake" in the class certification decision, sufficient to satisfy Article III's case and controversy requirement. This, according to Genesis, provides a basis upon which to distinguish *Weiss*, because, in the words of Genesis, "representative plaintiffs do not exist under the FLSA." (Appellees' Brief, p. 15). Contrary to Genesis' assertion, however, this Court's decision in *Weiss* was not based upon the class representative's "present interest" under Fed.R. Civ. P. 23 to represent the putative class. Rather, this Court's decision in *Weiss* was based upon the "relation back" doctrine and a recognition of the need to use such doctrine to eliminate a defendant's ability to "pick off" plaintiffs and thereby undermine the class action certification process.

Under both Fed.R.Civ.P. 23 and Section 216(b), there are strong policy reasons for preventing a defendant from "picking off" a plaintiff through a Rule

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would undoubtedly present a ready opportunity for abuse.") quoting *White v. Osmose, Inc.*, 204 F. Supp. 2d 1309, 1314 (M.D. Ala. 2002).

68 Offer of Judgment and for permitting the representative action processes to "play out." Indeed, there is nothing in the differences between Fed.R.Civ.P. 23 and the court-created two-step procedure for determining "similarly-situated" status under Section 216(b) of the FLSA which prevents the application of the "relation back" doctrine in the Section 216(b) context. The "relation back" doctrine can be, and should be, used to protect the legitimacy of this two-step procedure which has been developed by the federal courts to provide an orderly, fair, and efficient method for determining whether claims are "similarly situated" under the FLSA.

The Supreme Court has held that application of the "relation back" doctrine is warranted in cases where claims are "so inherently transitory that the trial court will not have enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980). In *Weiss*, this Court recognized that although plaintiff's claims were not "inherently transitory" in the sense that his claims were rendered moot by the passage of time, they were "transitory" in the sense that they were "acutely susceptible to mootness, in light of defendants' tactic of 'picking off' lead plaintiffs with a Rule 68 offer to avoid a class action." *Weiss*, 385 F.3d at 347 (internal quotation omitted). In order to protect the policies advanced by the Rule 23 class action device, this Court in *Weiss* extended the "relation back" doctrine to the situation where a defendant unilaterally attempts to thwart the class action procedure by conveying an offer of judgment before a class certification motion has been filed. Following Supreme Court precedent, this Court refused to allow mootness (through no fault of plain-

tiff) to deprive plaintiff of the reasonable opportunity to file a motion for class certification and to deprive the court of the opportunity to consider such motion.

Although the procedural differences between Rule 23 class actions and FLSA collective actions slightly alter the mechanical application of the "relation back" doctrine in the FLSA context, both types of representative actions are susceptible to "strategic mooting" by defendants and, thus, the policies underlying the "relation back" doctrine apply in both contexts. Under the "relation back" doctrine as described in *Weiss*, a putative class representative should be given a reasonable opportunity to move for class certification and that motion should be permitted, for jurisdictional purposes, to relate back to the time of the filing of the complaint. *Id.* at 348. Thus, in the Rule 23 context, it is the court's decision that the case should proceed as a representative action that relates back to the filing of the complaint. Likewise, here, the district court should have had the opportunity to determine if this case should proceed as a representative action. The district court should have allowed Symczyk the opportunity to move for conditional certification and for court approval to send notice to potential opt-in plaintiffs.[2] Any opt-ins

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[2] Genesis asserts that application of the relation back doctrine does not save Symczyk's collective action claims because Symczyk's failure to move for conditional certification within the ninety day period mandated by Local Rule 23 is *prima facie* evidence of "undue delay." (Appellees' Brief, p. 28-29, n. 14). However, in accordance with the district court's scheduling order, the parties were to have an initial ninety (90) day discovery period, at the close of which Symczyk was to move for conditional certification. However, Genesis served Symczyk with a Fed.R.Civ.P. 68 Offer of Judgment on February 18, 2010 and filed the motion to dismiss that is the subject of this appeal on

should then have been deemed "related back," for jurisdictional purposes, to the filing of Symczyk's complaint. Consistent with this Court's decision in Weiss, by relating the filing of any opt-ins back to the time at which the complaint was filed, there would remain a case and controversy sufficient to satisfy Article III's requirements.

Again, contrary to Defendant's assertion, this Court's holding in *Weiss* did not turn on the fact that a Rule 23 plaintiff; whose individual claim is mooted by a defendant's offer of judgment, "retains a 'personal stake' in the class certification decision sufficient to satisfy Article III's .adversity requirement." (Appellees' Brief pp. 13-14). Rather, it turns on this Court's desire to allow the class action procedure provided for in Rule 23 to "play out" as it was intended to be, notwithstanding the fact that the named plaintiff's claim has become moot through a defendant's Rule 68 Offer of Judgment.

III. THIS COURT'S RATIONALE FOR APPLYING THE "RELATION BACK" DOCTRINE IN *WEISS* APPLIES EQUALLY TO THIS CASE

In *Weiss*, this Court recognized Rule 23's purpose as a cost-sharing mechanism by which class action plaintiffs pool their resources and share in the costs of litigation in order to vindicate rights that would be uneconomical to pursue individually. *Weiss*, 385 F.3d at 344-45 (citing *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 n.9 (1980) and *Phillips Petroleum v. Shutts*, 472 U.S. 797, 809 (1985)). In addition, this Court recognized that this "[c]ost spreading can also

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March 23, 2010. Hence, to date, the parties have not engaged in any discovery related to conditional certification issues.

enhance the means for private attorney general enforcement and the resulting deterrence of wrongdoing." *Weiss*, 385 F.3d at 345 (quoting *In re Gen'l Motors Corp., Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995)).

In light of these policy interests inherent in Rule 23, this Court expressed strong reservation about permitting defendants to "contravene[] one of the primary purposes of class actions – the aggregation of numerous similar (especially small) claims in a single action" by simply tendering a Rule 68 offer of judgment to a putative class representative before the court has had an opportunity to determine whether the claims should be litigated collectively. *Weiss*, 385 F.3d at 345.[3] As this Court further noted, in addition to undermining the policies behind Rule 23, such a tactic also undermines the policies behind Rule 68, by potentially triggering successive lawsuits. *See* Moore's Federal Practice §68.02[2], at 68-7 (3d ed. 2004)("The primary purpose of Rule 68 is to promote settlements and avoid protracted litigation.").

There is nothing about the procedural differences between the Rule 23 class action mechanism and the FLSA collective action mechanism that counsels against extending the "relation back" doctrine to the FLSA context. In fact, the policy considerations that this Court found warranted application of the "relation back" doctrine in the Rule 23 class action context apply with full force and effect in the FLSA collective action context.

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[3] Likewise, Genesis' assertion that plaintiffs can readily avoid this mootness issue by having individuals opt into their collective actions would effectively turn the notice procedure set forth in *Hoffinan-La Roche* and its progeny on its head.

Section 216(b) of the FLSA provides: "An action...may be maintained against any employer...by one or more employees for and in behalf of himself or themselves and others similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. §216(b). In *Hoffman-LaRoche Inc. v. Sperling*, 493 U.S. 482 (1989), the Supreme Court approved the collective action mechanism for litigating FLSA claims and held that the court should play a direct role in the conditional certification and notice process[4]:

> Section 216(b)'s affirmative permission for employees to proceed on behalf of those similarly situated must grant the court the requisite procedural authority to manage the process of joining multiple parties in a manner that is orderly, sensible, and not otherwise contrary to statutory commands or the provisions of the Federal Rules of Civil Procedure. *See* Fed.RuleCiv.Proc. 83. It follows that, once a [collective action] is filed, the court has a managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way.

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[4] Although decided in the context of an Age Discrimination in Employment Act ("ADEA") claim, the ADEA incorporates the FLSA collective action mechanism through 29 U.S.C. §626(b). *See Whalen v. W.R. Grace & Co.*, 56 F.3d 504, 506 (3d Cir. 1995)("Section 7(b) of the ADEA incorporates the enforcement 'powers, remedies and procedures' of §16(b) of the Fair Labor Standards Act, 29 U.S.C. §216(b), which provides, in relevant part, that '[a] n action...may be maintained...by any one or more employees for and in behalf of himself or themselves and others employees similarly situated.' ")(quoting §216(b)).

Hoffman-LaRoche, 493 U.S. at 170-71. The Supreme Court expressly noted that the policies underlying the Section 216(b) collective action mechanism are: to "relieve employers from the burden of multiparty actions," *Id.* at 173; to provide plaintiffs with "the advantage of lower individual costs to vindicate rights by pooling of resources," *Id.* at 170; and the judicial efficiency that comes with the "resolution in one proceeding of common issues of law and fact arising from the same alleged [illegal] activity," *Id.*

District courts in this circuit have generally employed a two-step approach in order to determine when employees are "similarly situated" for purposes of Section 216(b) of the FLSA:

> At the "notice stage" – where the court determines whether notice should be given to potential members – the court's determination typically results in "conditional certification" of a representative class. At this stage, some courts have required nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy or plan. In the second stage, after the court has more evidence and the case is ready for trial, the court applies a stricter standard.

Brothers v. Portage National Bank, 2007 WL 965835, at *3 (W.D.Pa. March 29, 2007)(quoting *Moeck v. Gray Supply Corp.*, 2006 WL 42368, at *4 (D.N.J. Jan. 6, 2006)).

If defendants are permitted to use a Rule 68 Offer of Judgment to "pick off" an FLSA collective action plaintiff before the district court is afforded an opportunity to determine whether the claims should be litigated collectively, the Supreme Court-endorsed

collective action procedure under Section 216 of the FLSA will be effectively rendered a nullity – and the judicial economy promoted by collective actions will become illusory. This "pick off" tactic by defendants would prevent district courts from having any role in, or oversight of, the collective action and notice procedure, as contemplated by the Supreme Court and as developed by the various federal courts. This was the precise reason why this Court applied the "relation back" doctrine in *Weiss* (although in the Rule 23 context) – to prevent defendants from circumventing a representative action procedure and the policies underlying that procedure.

For the foregoing reasons and for the reasons set forth in her opening brief, Symczyk respectfully requests that this Court reverse the district court's Order granting Genesis' motion to dismiss for lack of subject matter jurisdiction.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to. Rule 46.1 of the Local Appellate Rules for the United States Court of Appeals for the Third Circuit, Gary F. Lynch and Gerald D. Wells, III, counsel for Appellant, certify that they are members in good standing of the bar of the United States Court of Appeals for the Third Circuit.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), the undersigned counsel of record certifies this Reply Brief of Appellant complies with the type and volume limitations of Fed. R. App. P. 32(a)(7)(B).

1. According to the word count in the word processing system employed in drafting this brief (Microsoft Word), the Reply Brief of Appellant contains 2,649 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).
2. This Brief has been prepared using Microsoft Word in Times New Roman 14-point font.

/s/ Gary F. Lynch

CERTIFICATE OF VIRUS CHECK

I further certify that the E-Brief was scanned for viruses using the Symantec anti-virus program.

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PETITIONER'S BRIEF

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No. 11-1059

IN THE
Supreme Court of the United States

GENESIS HEALTHCARE CORPORATION AND
ELDERCARE RESOURCES CORP.,
Petitioners,

v.

LAURA SYMCZYK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTION PRESENTED

Whether a case becomes moot, and thus beyond the judicial power of Article III, when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff's claims.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Genesis HealthCare Corporation is owned by FC-GEN Acquisition, Inc., which is owned by FC-GEN Acquisition Holding, LLC, which is owned by Health Care REIT, Inc. Of those entities, only Health Care REIT, Inc. is publicly traded.

Petitioner ElderCare Resources Corp. is owned by GHC Ancillary Corp., which is owned by Genesis HealthCare LLC, which is owned by GEN Operations II, LLC, which is owned by GEN Operations I, LLC, which is owned by FC-GEN Operations Investment, LLC. None of those entities is publicly traded.

The lone respondent is Laura Symczyk.

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IN THE

Supreme Court of the United States

No. 11-1059

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORP.,
Petitioners,

v.

LAURA SYMCZYK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 656 F.3d 189. The opinion of the district court resolving the issues relevant to the petition (Pet. App. 30-44) is unreported. A related order of the district court entering a final judgment (Pet. App. 45-46) also is unreported.

JURISDICTION

The court of appeals entered judgment on August 31, 2011 and denied a timely petition for rehearing on October 20, 2011. Pet. App. 47-48. On December 13, 2011, Justice Alito extended the time within which to file a petition for a writ of certiorari to

February 17, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the Constitution provides, in relevant part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under * * * the Laws of the United States * * * ."

29 U.S.C. 216(b) provides, in relevant part:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

STATEMENT OF THE CASE

1. For several months during 2007, respondent worked as a registered nurse at a facility in Philadelphia that was owned by a subsidiary of petitioner Genesis HealthCare Corporation. In December of 2009, after respondent had ceased working at that facility, she filed suit, alleging that petitioners had violated the Fair Labor Standards Act of 1938 (the "FLSA"), 29 U.S.C. 201, *et seq.*, claiming that her employer automatically charged her for meal breaks, without regard to whether she in fact took an uninterrupted break. *See* J.A. 21-31. Although respondent purported to bring the action on behalf of herself "and other similarly situated individuals" (J.A. 21), no other individual ever has joined the complaint. Thus, at all times since the filing of the complaint, respondent has been the sole plaintiff.[1] Pet. App. 3, 6 (opinion of court of appeals noting the absence of other claimants), 42 (opinion of district court noting the same).

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[1] Section 216(b) of the Fair Labor Standards Act does not permit class actions under Fed. R. Civ. P. 23. Rather, under that statute, parties can maintain and join a collective action only by filing written consent with the trial court. Section 216(b) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."); *see Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 169-74 (1989) (discussing rules for joining actions under Section 216(b)). Thus, for example, the dismissal of an FLSA collective action has no effect on the right of non-joined employees to bring a subsequent suit. *See Cameron-Grant v. Maxim Healthcare Services, Inc.*, 347 F.3d 1240, 1248-49 (CA11 2003).

2. On February 18, 2010, petitioners answered the complaint and served an offer of judgment under Fed. R. Civ. P. 68 for $7,500 in alleged unpaid wages, as well as "attorneys' fees, costs and expenses as determined by the Court."[2] J.A. 21-31 (complaint), 55-57 (formal offer of judgment), 77-79 (transmittal letter detailing terms of offer). Respondent did not respond to the offer. Because the offer to pay her claims in full left respondent without an ongoing personal stake in the litigation, petitioners on March 23, 2010 filed a motion to dismiss the case under Fed. R. Civ. P. 12(b)(1). J.A. 64-65.

3. On May 19, 2010, the district court issued a detailed opinion tentatively granting the motion. Pet. App. 30-44. The court started from respondent's concession that the offer fully satisfied her claims. Pet. App. 34. The court also noted the settled rule that an offer of full satisfaction under Rule 68 moots a plaintiff's claim and thus warrants dismissal. Pet. App. 35-36 (citing *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *Weiss v. Regal Collections*, 385 F.3d 337, 340 (CA3 2004)).[3] The district court acknowledged that some courts had declined to dismiss collective actions under the FLSA even when a defendant made a full offer of settlement, but pointed out that in all but one of those cases other individuals already had joined the action, or the

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[2] The only relief available to respondent was monetary, as the FLSA does not authorize equitable relief for private plaintiffs. 29 U.S.C. § 216(b); *see Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 921 n.6 (CA5 2008).

[3] Respondent conceded that point in the district court. *See* J.A. 93 ("An offer of complete relief will generally moot the plaintiff's claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation.").

plaintiff had at least moved for collective process.[4] Pet. App. 38-42. In this case, by contrast, because there were no plaintiffs with unsatisfied claims at the time of the motion to dismiss, and not even a pending motion for collective process, the court concluded that dismissal of the FLSA claim was appropriate. Pet. App. 42-44.

4. On June 24, 2010, after subsequent proceedings (not at issue here or in the court of appeals) in which the district court concluded that it was inappropriate to exercise supplemental jurisdiction over analogous state-law claims,[5] the district court dismissed the case. Pet. App. 45-46.

5. The court of appeals reversed. Pet. App. 1-29. The court acknowledged that the offer of full relief eliminated any legally cognizable interest of respondent in the case. Pet. App. 14 ("An offer of complete relief will generally moot the plaintiff's claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation.").[6] The court further noted that the lack of a justiciable controversy with the lone plaintiff ordinarily would justify immediate dismissal. The court concluded, however, that it

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[4] Under *Hoffman-La Roche Inc.*, the district court in an FLSA action has the authority to supervise the process of sending notice of an action to potential claimants. *See Hoffman-La Roche Inc.*, *supra*, 493 U.S. at 169-74.

[5] Respondent added those claims by amending the original complaint. *See* J.A. 115-133.

[6] Respondent conceded that point in the court of appeals. *See* J.A. 193 ("An offer of complete relief will generally moot the plaintiff's claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation."), 433 (acknowledging that a "plaintiff['s] individual claim is mooted by a defendant's offer of judgment").

would "frustrate the objectives of class actions" to allow a defendant's tender of judgment to "pic[k] off" multiple plaintiffs. Pet. App. 15 (quoting *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980)).

The court relied heavily on cases involving class actions under Fed. R. Civ. P. 23. In that context, the court noted, several courts of appeals have held that a case does not become moot when the claims of a class representative become moot, on the theory that the certification of a class "relates back" to the filing of the complaint. In those courts, for purposes of mootness analysis, all members of the class become parties as of the date of the complaint. Under that rule, a class action remains justiciable even after the loss of the claims of the named plaintiffs. Pet. App. 15-20 (citing *Weiss*, *supra*).

The court emphasized concerns that a mootness inquiry "predicated inflexibly on whether any employee has opted in to an action" would make it too easy for employers to dispose of litigation (by paying full satisfaction to all plaintiffs). Pet. App. 23-24. The court also relied heavily on its sense of the "considerations that caution against allowing [settlement offers] to impede the advancement of a representative action." Pet. App. 25-27. Concluding that a contrary decision would "facilitat[e] an outcome antithetical to the purposes behind § 216(b)" (Pet. App. 26), the court permitted the action to go forward (Pet. App. 28-29).

6. Petitioner filed a timely petition for rehearing, which the court of appeals denied without opinion on October 20, 2011. Pet. App. 47-48.

7. Petitioners filed a timely petition for certiorari, which the Court granted on June 25, 2012.

SUMMARY OF ARGUMENT

This case has had no plaintiff with a legally cognizable stake for more than two years, since petitioners offered to pay respondent's claims in full. In the absence of additional claimants, the only individuals who stand to gain from continuing litigation are respondent's counsel and the as-yet unidentified hypothetical claimants. Lacking a "personal" stake, the interests of those non-parties do not create a "Case" within the judicial Power of Article III. A straightforward application of constitutional first principles compels reversal of the decision of the court of appeals.

1. The limitation of the judicial Power to "Cases" in which a plaintiff has a "personal" stake is central to the Constitution's separation of powers and the judiciary's role in our republic. This requirement not only delimits the judicial Power from the authority of the democratic Branches, but also ensures that federal courts exercise their power only over disputes of a traditional form.

2. This case is unusual, because the lone plaintiff's interests admittedly have been lost. Thus, the case is pressed by respondent's counsel, on behalf of hypothetical claimants that they might represent if they ever were located. Neither group provides the requisite "personal" stake to make the case justiciable.

a. The interests of respondent's counsel plainly are insufficient. The interests of bystanders, however sincere or vigorous, are no substitute for a personal stake. Lacking an injury in fact, their interest in the

subject matter is categorically irrelevant. Just as the Court steadfastly has insisted that bounty hunters and interest groups have standing only when they can demonstrate a personal stake, the Court here should reject the efforts of respondent's counsel to maintain this lawsuit without a plaintiff.

b. Nor do the interests of hypothetical claimants provide the requisite stake. The court of appeals solved the problem by exempting collective litigation from the personal stake requirement. But attention to the personal stake requirement structures and guides the analysis of this Court's decisions assessing the justiciability of collective litigation; *Roper* and its companion *United States Parole Commission v. Geraghty*, 445 U.S. 388, 397 (1980), are the crucial authorities.

I. First, because the offer of judgment vitiated respondent's personal stake, and because the district court had taken no steps toward collective process at the time of the offer of judgment, the interests of the hypothetical potential claimants are not yet legally cognizable. *Roper* turned on the named plaintiffs' continuing obligation to pay attorney fees and expenses, which gave the named plaintiffs a personal stake in continuing litigation not present here. Moreover, the Court's passing suggestion that a too ready willingness to permit defendants to "pic[k] off" plaintiffs might frustrate the objectives of class actions was limited by its terms to cases in which the district court already had ruled on a certification motion.

Because the offer of judgment in this case came before respondent even filed a motion for collective proceedings, the dictum would have no application here even if the Court did credit it. Most telling of all, the opinion in *Geraghty* explicitly limits the relevance of the interests of absent claimants to cases in which the trial court rules on the propriety of class certification *before* the vitiation of the personal stake of the named plaintiff.

Roper and *Geraghty* provide neither authority for ignoring the personal stake requirement nor any basis for finding it satisfied on these facts. Whatever the merits of *Roper* and *Geraghty* on their own facts, the Court's vigorous application of the personal stake requirement in the intervening decades forestalls any extension broad enough to reach this case.

II. Second, because this case arises under the Fair Labor Standards Act, the interests of the hypothetical claimants are even more remote than in class action cases like *Roper* and *Geraghty*. Unlike a class representative in a Rule 23 case, respondent here has no power to join other claimants or otherwise affect their interests; they become parties only by a formal written filing with the district court. Hence, respondent can have no cognizable stake in the potential interests of as-yet unidentified claimants. Even if the case proceeds to a stage where collective process is appropriate, each claimant would join the case separately, and respondent would have no power to bind those who do not appear. Thus, it is even harder to extend *Roper* and *Geraghty* to this case than to a similarly nascent case under Rule 23. The absence of any link between respondent and other hypothetical claimants provides a separate and

independent basis for reversal of the decision of the court of appeals.

ARGUMENT

I. Article III Requires a Personal Stake in any "Case."

Article III, Section 2 of the Constitution limits the federal "judicial Power" to "Cases" and "Controversies." Hence, the judicial Power "cannot be defined, and indeed has no substance, without reference to the necessity 'to adjudge the legal rights of litigants in actual controversies.'"[7] Straying beyond those boundaries involves the exercise of authority that "is not judicial * * * in the sense in which judicial power is granted by the Constitution to the courts of the United States."[8]

Among other things, the limitation of that Power to Cases and Controversies ensures that federal courts confine themselves to "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). Responding to the centrality of that concern, the Court's rules for identifying parties with standing turn "on whether the party invoking federal court jurisdiction has 'a personal stake in the outcome of the controversy,' and whether the dispute touches upon 'the legal relations

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[7] *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982) (quoting *Liverpool, N.Y. & Phila. S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885)).

[8] *United States v. Ferreira*, 54 U.S. (13 How.) 40, 48 (1852).

of parties having adverse legal interests.'"[9] Although "ambiguity" once plagued the question whether the Court's standing doctrine is compelled by the Constitution "ex proprio vigore," it is now "resolved" that the personal stake requirement is part of the "irreducible minimum" that Article III requires. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-72 (1982). Thus, the Court decades ago resolutely concluded that "[t]he Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

The personal stake requirement is fundamental to the Court's long-standing conception of the judicial Power. "It requires federal courts to satisfy themselves that 'the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant *his* invocation of federal-court jurisdiction.'"[10] The baseline requirement of "concrete adverseness," as opposed to mere theoretical interest, is what "sharpens the presentation of issues" appropriately. *Baker v. Carr*, 369 U.S. 186, 204 (1962). "This personal stake is what the Court has consistently held enables a complainant authoritatively to present to

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[9] *Flast*, 392 U.S. at 100-01 (internal citations omitted (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937))).

[10] *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009) (quoting *Warth*, *supra*, 422 U.S. at 498-99 (quoting *Baker*, *supra*, 369 U.S. at 204)) (emphasis of *Summers* Court); *see Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000) (discussing Article III requirement of a "concrete private interest in the outcome" of litigation).

a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974).

The Court recently underscored the important structural role the requirement serves in separating the powers of the respective Branches:

> This requirement assures that "there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party." Where that need does not exist, allowing courts to oversee legislative or executive action "would significantly alter the allocation of power * * * away from a democratic form of government."

Summers v. Earth Island Institute, 555 U.S. 488, 493 (2009) (internal citations omitted) (quoting *Schlesinger*, 418 U.S. at 221; and *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring)); *see Sierra Club v. Morton*, 405 U.S. 727, 740-41 (1972); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring) (explaining that the need for a "concrete and personal" injury is "not just an empty formality" and "confines the Judicial Branch to its proper, limited role in the constitutional framework of Government").

The personal stake requirement ensures that necessity rather than abstract interest motivates exercise of the judicial Power. *See Poe v. Ullman*, 367 U.S. 497, 503 (1961) (plurality opinion of Frankfurter, J.) ("[T]he adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of

the controverted issue a practical necessity."); *Waite v. Dowley*, 94 U.S. 527, 534 (1877) ("This court does not sit here to try moot cases to solve a question which may never be raised by any party entitled to raise it.").

The "personal stake" aspect of the constitutional standing doctrine is inextricably tied to the mootness rules at issue in this case. The law of mootness reflects the requirement that a controversy must exist not only when the case is filed, but must continue throughout the litigation. *Geraghty*, *supra*, 445 U.S. at 397; *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 179-184 (2000); *Pacific Bell Tel. Co. v. Linkline Communications, Inc.*, 555 U.S. 438, 447 (2009). Thus, when cases cease to affect "'the legal relations of parties having adverse legal interests,'" they are at that moment moot, because "federal courts are without power to decide questions that cannot affect the rights of litigants in the cases before them."[11] In sum, "[a]n '"actual controversy must be present at all stages of review, not merely at the time the complaint is filed."'"[12] In those terms, then, the question before the Court is whether any plaintiff has the personal stake necessary to support Article III adjudication of the dispute.

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[11] *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam) (quoting *Haworth*, *supra*, 300 U.S. at 240-41).

[12] *Alvarez v. Smith*, 130 S. Ct. 576, 580 (2009) (brackets omitted) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974))); *see Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990) ("This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate.").

II. The Interests of Non-Parties Do Not Create a Justiciable Controversy Between Petitioners and Those Individuals.

The Court typically considers the "personal" stake requirement in cases in which the parties to the case have an interest the quality of which is debatable. But respondent has never disputed the mootness of her own claim, either in her brief in opposition to the petition in this Court,[13] or in her filings in the courts below.[14] Thus, in contrast to the traditional personal stake cases, the argument here is that a justiciable "Case" exists not because of the interests of the plaintiff, but because of the interests of others that admittedly are not parties. Two groups with some interest in the continuing litigation are apparent: first, the individuals driving the case forward presently, respondent's counsel; and second, the as-yet unidentified hypothetical claimants for whom respondent's counsel claims to act. Neither of those groups can provide the personal interest that Article III requires.

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[13] The brief in opposition's succinct discussion of the merits proceeds on the premise that respondent's claims are moot. First, it concedes that the offer of judgment "provided complete relief on [respondent's] individual claims." Br. in Opp. i (Question Presented). Second, it justifies the decision below by reference to cases holding that a class action does not become moot "just because the named plaintiff's individual claims become moot" or "after the named plaintiff's claims had become moot." Br. in Opp. 6.

[14] *See* J.A. 93 (district court), 193, 433 (court of appeals).

A. The Interests of Bystanders, However Concerned, Do Not Provide the Requisite "Personal" Stake.

The interests of respondent's counsel are easily addressed. The Court repeatedly has emphasized that the interests of bystanders, however sincerely or vigorously motivated, do not provide the *personal* stake that delimits the judicial Power. This is true even when they are parties to the litigation. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), is illustrative. In that case, a private individual (Stevens) brought a *qui tam* action under the federal False Claims Act, 31 U.S.C. 3730, seeking relief for an injury that the United States allegedly suffered from false statements made to it by the Vermont Agency of Natural Resources. *Vermont Agency*, 529 U.S. at 770.

The Court noted the problematic nature of the action under Article III: Stevens brought suit to remedy an injury suffered by the United States; the conduct of the Vermont agency invaded no legally protected interest of Stevens individually. Thus, at first glance, Stevens could have no standing to bring the action. The Court emphasized the irrelevance to the justiciability inquiry of the bounty that Stevens would receive as a successful relator under the False Claims Act: "An interest unrelated to injury in fact is insufficient to give a plaintiff standing." *Vermont Agency*, *supra*, 529 U.S. at 772. In the same way, the interests of respondent's attorneys – however monetarily concrete or ethically motivated – cannot provide a personal stake once respondent lost a legally cognizable interest in the dispute. "[A]n interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for

Article III standing purposes." *Id.* at 773. The only injury in fact in this case is the injury originally alleged by respondent; the monetary interest of respondent's counsel in the litigation thus cannot provide the "personal" stake that Article III requires.

The action in *Vermont Agency* was saved only by the Court's conclusion that the *qui tam* statute at issue there, like similar statutes common for centuries before the drafting of Article III, reflected a valid assignment of a portion of the claim of the United States (the injured party) to Stevens (the relator bringing the *qui tam* action). *Vermont Agency*, *supra*, 529 U.S. at 774-78. There is, of course, no such assignment either in the Fair Labor Standards Act or the record before the Court. *See also* Model Rules of Professional Conduct Rule 1.8(i) ("A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client [except for payment of fees]."); *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269, 306-07 (2008) (Roberts, C.J., dissenting) (discussing common-law prohibitions on champerty and maintenance).

The Court has been similarly steadfast in rejecting the standing of interest groups of various kinds, even when it was clear those parties would present the issue vigorously. Thus, the Court's "decisions make clear that an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40 (1976); *see Lujan*, *supra*, 504 U.S. at 563 (explaining even a "special interest" in a subject does not confer Article III standing). The Court has long recognized the

unmanageable consequences of permitting mere "interest" in a subject to displace the personal interest requirement:

> [I]f a "special interest" in this subject were enough to entitle [an interested group] to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by another bona fide "special interest" organization, however small or short-lived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.

Sierra Club, *supra*, 405 U.S. at 739-40.

That is not to say that a monetary interest in litigation cannot ensure a vigorous presentation of the issues. It is to say, however, that it does not provide the type of presentation Article III contemplates. As then Judge Scalia once explained:

> Often the very best adversaries are national organizations such as the NAACP or the American Civil Liberties Union that have a keen interest in the abstract question at issue in the case, but no "concrete injury in fact" whatever. Yet the doctrine of standing clearly excludes them, unless they can attach themselves to some particular individual who happens to have some personal interest (however minor) at stake.

Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 891-92 (1983).

Ultimately, this rule

> preserves the vitality of the adversary process by assuring both that the parties before the court will have an actual, as opposed to professed, stake in the outcome and that "the legal questions presented * * * will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."

Lujan, *supra*, 504 U.S. at 581 (Kennedy, J., concurring) (quoting *Valley Forge Christian College*, *supra*, 454 U.S. at 472). In the absence of a party with a "personal" stake, the dispute cannot be a "Case" within the judicial Power.

B. The Interests of Hypothetical Claimants That Are Not Yet Parties Do Not Provide the Requisite "Personal" Stake.

The court of appeals based justiciability on the interests of the hypothetical future claimants. That analysis involves a fundamental misapplication of the constitutional principles summarized in Point I and a basic misreading of the opinions in *Roper* and its companion *Geraghty*. Two distinct points are salient, either of which warrants reversal of the decision below. The first involves the reasoning of this Court's decisions themselves: neither *Roper* nor *Geraghty* suggests that the interests of potential plaintiffs are made relevant solely by the filing of a complaint. Rather, *Roper* disclaims reliance on those interests entirely and *Geraghty* states that they become relevant only upon the trial court's dis-

position of a motion for class certification.[15] The second is the narrower point that *Roper* and *Geraghty* were both class actions under Rule 23, not actions like this one under the FLSA. Because claimants can join an FLSA action only by an affirmative filing with the Court, treating the interests of absent claimants as dispositive is even more attenuated in the FLSA context than it is in the Rule 23 context.

1. Initiating a Purportedly Collective Action Does Not Create a "Case" Between the Defendants and Hypothetical Claimants.

The most startling aspect of the decision of the court of appeals is its unfounded extension of *Roper*, resting directly on the panel's sense of appropriate policy, without even a gesture in the direction of the "personal stake" requirement. In substance, the court of appeals reasoned from the Court's off-hand observation in *Roper* that "multiple plaintiffs * * * could be 'picked off' by a defendant's tender of judgment" (445 U.S. at 339) to a broad rule that the "personal stake" requirement has no application in collective litigation. Not surprisingly, given the

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[15] Although the brief in opposition relies in passing (Br. in Opp. 6-7) on *Sosna v. Iowa*, 419 U.S. 393 (1975), and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), those cases have no apparent independent relevance. First, *Sosna* is irrelevant because the dispute here is not "capable of repetition" between the same parties; respondent's employment has been terminated and there is no claim that respondent again will be subject to the conditions that led to this dispute. *Sosna*, 419 U.S. at 399-401; *Weinstein v. Bradford*, 423 U.S. 147, 148-49 (1975). Similarly, because there is nothing "inherently transitory" about respondent's action for damages, respondent can draw no support from *Gerstein v. Pugh*, 420 U.S. 103 (1975), or its progeny. *See County of Riverside*, 500 U.S. at 52.

vigor of the Court's long-standing commitment to the personal stake requirement, the opinions in *Roper* and its companion *Geraghty* will bear no such reading.

a. The plaintiffs in *Roper* brought claims against a national bank alleging, among other things, violations of the National Bank Act, 12 U.S.C. 85, 86. The district court denied a motion for class certification, but certified the question for discretionary interlocutory appeal to the court of appeals. After the court of appeals denied the motion for interlocutory appeal, the defendant bank tendered an offer of judgment under Rule 68, which included the maximum amount of damages, legal interest, and court costs. After the plaintiffs declined to accept the offer, the district court entered judgment in favor of the plaintiffs and dismissed the action. *Roper*, *supra*, 445 U.S. at 327-30.

When the plaintiffs sought to continue their challenge to the denial of class certification, the question arose whether they could do so despite the loss of their individual claims. Ultimately, the *Roper* Court concluded that the case remained justiciable despite the tender of relief under Rule 68. Unlike the court below, the *Roper* Court organized its analysis around the need to identify a continuing personal stake in the litigation. *Roper*, *supra*, 445 U.S. at 331 ("We begin by identifying the interests to be considered * * * . First is the interest of the named plaintiffs: their personal stake in the substantive controversy * * * ."). The Court then explained that the offer of judgment could not moot the claim of the plaintiffs on the merits "so long as they retained an economic interest in class certification." *Roper*, *supra*, 445 U.S. at 332-33. Because the offer of

judgment did not cover the fees and expenses of the litigation, the possibility that the named plaintiffs could shift "a portion of those fees and expenses" to other class litigants gave the named plaintiffs a continuing "personal stake" in the case. *Id.* at 334 n.6.

After identifying the specific economic interest that the plaintiffs retained notwithstanding the offer of judgment, the Court (per Chief Justice Burger) went on in dicta to discuss the value to the litigation system of permitting an appeal of the district court's ruling on the certification issue. In that context, where the trial court already has ruled on what "is often the most significant decision rendered in * * * class-action proceedings," the Court suggested that it would frustrate the objectives of class actions to permit sequential "pick[ing] off" of the plaintiffs in separate actions to forestall appellate review of a certification ruling. *Roper*, *supra*, 445 U.S. at 339.

Neither the analysis nor the dicta of *Roper* offer any support for the decision of the court of appeals. First, the holding itself turns directly on the continuing economic interest of the plaintiffs, which would have remained even if they had received everything offered by the defendants. As respondent has conceded throughout this litigation,[16] the offer of judgment in this case left respondent with no similarly unsatisfied interest. That concession

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[16] *See* Pet. App. 34 (opinion of district court) ("[Respondent] does not take issue with [petitioners'] assertion that the damages offered exceed any amount of unpaid wages sought."); Pet. App. 4 (opinion of court of appeals) ("[Respondent] did not dispute the adequacy of [petitioners'] offer * * * ."); Br. in Opp. i (Question Presented) ("[T]he [petitioners] made a Rule 68 offer that provided complete relief on [respondent's] individual claims.").

deprives *Roper* of any precedential relevance to the case at hand.

Moreover, even if the Court were inclined to give weight to the discursion about "picked off" plaintiffs, that passage is limited by its own terms to situations (like *Roper*) in which the trial court already had ruled on a class certification motion before the vitiation of the personal stake of the named plaintiffs. The premise of the comment is that a district court's class certification decision is so important that there is an independent interest in obtaining appellate review of it. The conduct that raised the Court's concern was the serial picking off of plaintiffs who had pressed separate cases to final decisions on certification and then were unable to obtain appellate review.

None of that has any relevance to the case before the Court. This case involves a lone plaintiff, who received an offer of judgment promptly in response to the complaint, who had not filed any motion related to collective proceedings, much less put in the effort and expense to press it to a final decision. Because the *Roper* Court founded its opinion directly on the personal stake requirement, it makes no sense at all to read that passage (as the court below did) as jettisoning the personal stake requirement from all collective litigation.

b. The Court's decision in *Geraghty* buttresses that straightforward reading of *Roper*. The sole plaintiff in *Geraghty* challenged the validity of parole release guidelines promulgated by the United States Parole Commission. The mootness problem arose when the plaintiff was released from prison. As in *Roper*, the plaintiff lost his interest in the litigation after the trial court had denied his motion for class certification. *Geraghty*, *supra*, 445 U.S. at 390. As in

Roper, and in contrast to the court below, the Court started from the premise that the case turned on "the application of the 'personal stake' requirement in the class-action context." *Id.* at 397.

Unlike the plaintiff in *Roper*, but like respondent here, Geraghty admittedly retained no personal stake in the litigation. Accordingly, the Court structured its opinion around the possibility that the interests of the absent class members had become sufficiently related to the plaintiff's interest to justify retention of jurisdiction. Thus, the Court first noted its prior holdings that a dispute would remain justiciable despite expiration of the named plaintiff's claim if a class had been certified *before* the claim expired; because certification gave class members a cognizable interest in the case, the loss of the representative's interest would not vitiate the entire litigation. 445 U.S. at 398-99.

The Court then turned to the problem before it – whether to extend those holdings to a case in which certification of a class had been *denied* before the vitiation of the personal stake of the named plaintiff. 445 U.S. at 397-404. Relying on the "flexible character of the Art. III mootness doctrine" (*id.* at 400), the Court concluded that the distinction between cases in which certification was granted and cases in which certification was denied was too narrow to compel dismissal. *Id.* at 401-02. Accordingly, the Court held that the case remained justiciable despite the loss of the plaintiff's interest. *Id.* at 402-04.

To be sure, the "personal stake" that absent class members have in litigation when certification has been denied is considerably more abstract than the personal interest they have when certification has

been granted. *See Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379-80 (2011) (emphasizing that claimants become "parties" only upon certification of a class). Thus, the decision to uphold justiciability in *Geraghty* may seem to press the proper limits of the personal stake requirement. The propriety of *Geraghty* itself is not presented here, however, because (once *Roper* is put to the side) a decision to affirm the court of appeals would require a major extension of *Geraghty*.

This case presents the question whether to extend *Geraghty* to recognize the interests of absent class members when the plaintiff's claim becomes moot before *any* ruling on a motion for collective process (either of a class or under Section 216(b)). Indeed, for respondent to prevail here, the answer would have to be that the interests of the absent individuals in a collective action become relevant at the moment the case was filed: petitioners in this case made the offer of judgment not only before the trial court had ruled on any motion related to collective process, but even before respondent had filed a motion seeking collective process.

Any such extension of *Geraghty* would require the Court to discard the language and reasoning of *Geraghty* itself, in which the district court's prior certification decision is crucial. Three points warrant attention. First, as summarized above, the basis of the decision in *Geraghty* was the narrow distinction between cases in which certification is granted and those in which it is denied. Second, the Court emphasized that its "holding [of justiciability] is limited to the appeal of the denial of the certification motion," *id.* at 404. Third and most telling is the Court's response to Justice Powell's dissenting view that the extension wrought by *Geraghty* decision

would make the judicial process a "vehicle for 'concerned bystanders,'" 445 U.S. at 407 n.11 (quoting 445 U.S. at 413 (Powell, J., dissenting)). Attempting to assuage Justice Powell's concerns, the Court explicitly limited its decision to cases in which the trial court ruled on a certification motion *before* expiration of the plaintiff's claim: "If the named plaintiff has no personal stake in the outcome at the time class certification is denied, relation back of appellate reversal of that denial still would not prevent mootness of the action." 445 U.S. at 407 n.11. Each of those qualifications puts this case outside the rule contemplated in *Geraghty*.

The close division of the *Geraghty* Court, the evident concerns of the majority to provide a predictable boundary to the holding of that case, and the difficulty of reconciling the personal stake requirement with the decision below cut against such a broad expansion of *Geraghty*. The only palatable reading of *Geraghty* is the simplest one: (1) the Court limited its decision to cases in which certification was denied before mootness; (2) because respondent's claims became moot before that point, this case is no longer justiciable.

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In sum, because the offer of judgment in this case deprived respondent of any personal stake in the litigation, and because it did so before any district court ruling on the propriety of collective process, the analysis of *Roper* and *Geraghty* provide no support for the decision of the court of appeals. Any extension of those cases to support justiciability in this case would have to reject the language and animating principle of those cases and at the same time ignore the lessons of the personal stake require-

ment that the Court has defended so vigorously. Reversal is the easier and more sensible path.

2. An FLSA Complaint Does Not Create a "Case" Between the Defendants and Hypothetical Claimants.

The basis for the claim in this case also affords a separate, and even simpler, basis for reversing the decision of the court of appeals. As the court of appeals recognized (Pet. App. 20-22), important differences between Rule 23 and the FLSA undermine the plausibility of extending *Roper* and *Geraghty* to FLSA cases like this one. The basic problem is that the representative in a class action represents the interests of absent class members in important ways. By contrast, the plaintiff in an action under Section 216(b) of the FLSA has a much narrower role. The distinction is not technical, but substantive, as Justice Scalia has explained in detail. *See Hoffmann-La Roche Inc.*, *supra*, 493 U.S. at 175-78 (Scalia, J., dissenting) (emphasizing the difference between a class actions and an action under Section 216(b)). And the differences are directly relevant here, because they arise from Congress's intentional choice more than half a century ago to "aboli[sh]" the "representative action" previously available under the FLSA, driven by concerns about "excessive litigation spawned by plaintiffs lacking a personal interest in the outcome," *Hoffmann-La Roche Inc.*, 493 U.S. at 173.

The mechanism that remains, the action under Section 216(b), is quite unlike a Rule 23 class action. Most obviously, the named plaintiff that initiates the case has no power, alone, to join others to the litigation or to affect their rights before they join.

Rather, no employee can become "a party plaintiff * * * unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." Section 216(b). Hence, until respondent obtains such consent, there is no realistic sense in which petitioners have a controversy with any of those absent employees. Indeed, even if the court decides to proceed collectively, the named plaintiff does not become some sort of representative for a class of similarly situated individuals. Rather, despite the language of "certification" used by the court of appeals (Pet. App. 11-13), the collective aspect in question involves only the court's participation in the process of transmitting notice of the case to still-potential claimants. *See Hoffmann-La Roche Inc.*, *supra*, 493 U.S. at 170-73.[17]

This is a far cry from litigation under Rule 23, in which certification of a class brings absent members into the case without any action on their part. *See Devlin v. Scardelletti*, 536 U.S. 1, 6-7 (2002) (explaining that class members have an interest in a class action settlement that satisfies Article III standing requirements). Thus, for example, "under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation." *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984); *Devlin*, 536 U.S. at 10-11; *see also* Fed. R. Civ. P. 23(c)(3); Restatement (Second) of

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[17] That is not to say that the process necessarily is simple or inexpensive. Ordinarily, the defendant is subjected to considerable discovery in the process of identifying for the plaintiffs the identities of potential claimants to whom notices might be sent. *See, e.g.*, Pet. App. 32-33.

Judgments § 41(1)(e) (1982). Absent claimants in the FLSA context have no similar interest, and respondent has no similar responsibility for them. *See Hoffmann-La Roche Inc.*, 493 U.S. at 177 (Scalia, J., dissenting) (contrasting class-action process with FLSA process).

In the words of Chief Justice Marshall, any possible dispute between petitioners and the still-absent individuals "becomes a case" for purposes of Article III only when "a party * * * asserts his rights in the form prescribed by law," *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 819 (1824) (quoted in *Hoffmann-La Roche Inc.*, 493 U.S. at 175-76 (Scalia, J., dissenting)); *cf. Vermont Agency*, *supra*, 529 U.S. at 773 (explaining that there can be no Article III standing on the part of an assignee until some claim has been assigned).

The court of appeals recognized that Section 216(b) differs in material ways from the class action procedure at issue in *Roper*. It concluded, however, that "actualization of § 216(b)'s purposes" precluded a "mootness inquiry * * * predicated inflexibly" on identifying the personal stake of an employee to the litigation. Pet. App. 23-24. Thus, the court of appeals did not even attempt to identify respondent's personal stake. Rather, it focused entirely on the parallel policy "considerations" (Pet. App. 25) and "objectives" (Pet. App. 28) that motivate Rule 23 and Section 216(b). But as explained above in Point I, those considerations and objectives have no weight in the absence of a plaintiff with a personal stake in the litigation. The mere potential for collective action does not give federal courts a "free pass" to ignore the personal stake requirement.

The court of appeals erred in heedlessly transplanting the policy concerns that drove its decision from a context in which such a personal stake was present (*Roper*) to one where no such personal stake exists. As illustrated above, *Roper*'s discussion of "picked off" plaintiffs appeared in a fact setting in which the plaintiff had a cognizable economic stake in certification of a class and was limited by its terms to cases in which the trial court already had ruled on the question of certification. Whatever the relation between the concerns about "picked off" plaintiffs and the holding in *Roper*, it makes no sense to extend that dictum to cases in which the named plaintiff cannot bind the absent claimants until they take affirmative action to join the case. *See also Smith*, *supra*, 131 S. Ct. at 2381 (emphasizing that a "properly conducted class action, with binding effect on nonparties, can come about in federal courts in just one way – through the procedure set out in Rule 23") (internal quotation marks omitted). There is no coherent basis for treating the existence of a single FLSA plaintiff as creating a "Case" between the defendants and other not-yet identified potential litigants.

In sum, the most direct path to a decision in this case is to hold that the interests of the absent individual have no relevance in the specific statutory framework of Section 216(b). That holding compels reversal of the decision of the court of appeals.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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RESPONDENT'S BRIEF

RECORD AND BRIEFS

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GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORP.,
Petitioners,

v.

LAURA SYMCZYK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTION PRESENTED

Can defendants, in a case brought as a collective action under section 16(b) of the Fair Labor Standards Act, render the case moot by making an offer of judgment that is not accepted and that offers relief only to the representative plaintiff?

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IN THE

Supreme Court of the United States

No. 11-1059

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORP.,
Petitioners,

v.

LAURA SYMCZYK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

INTRODUCTION

Three-quarters of a century ago, Congress in section 16(b) of the Fair Labor Standards Act (FLSA) "stated its policy that [FLSA] plaintiffs should have the opportunity to proceed collectively." *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U.S. 165, 170 (1989). Congress thus provided that an employee whose minimum wage or overtime compensation rights have been violated can bring an action against his employer "for and in behalf of himself * * * and other employees similarly situated." 29 U.S.C. §216(b). This Court has explained that, through that provision, Congress provided "affirmative permission

for employees to proceed on behalf of those similarly situated." *Hoffmann-La Roche*, 493 U.S. at 170. This case concerns whether, despite this affirmative legislative choice, an employer can moot a collective action by making an offer of judgment to the employee who filed the collective action—and doing so (1) before additional plaintiffs have had notice and the opportunity to opt in to the action, (2) in a manner that offers relief only to *that* employee, and (3) under circumstances that led that employee to reject the offer.

STATEMENT

A. Collective Actions Under the FLSA

1. "Congress enacted the FLSA in 1938 with the goal of 'protect[ing] all covered workers from substandard wages and oppressive working hours.'" *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2162 (2012) (citation omitted). The "prime purpose" of the FLSA "was to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 707 n.18 (1945).

To help further its goals, Congress provided in the Act that an employee or multiple employees could bring an action "in behalf of himself or themselves and other employees similarly situated"—thereby creating a collective action. Fair Labor Standards Act of 1938, 52 Stat. 1069. They could also "designate an agent or representative to maintain such action for and in behalf of all employees similarly situated"—thereby creating a representative action. *Id.* The statute has evolved over time, including the

elimination of the "representative action" in 1947. But Congress has never altered the original "similarly situated" language. Rather, Congress has intentionally preserved the authority for employees to bring "collective actions." *Hoffman-La Roche*, 493 U.S. at 173.

2. This Court has made clear that "[t]he broad remedial goal of the statute should be enforced to the full extent of its terms." *Id.* To that end, courts have developed extensive processes for managing collective actions, generally employing a two-step approach. *See* 7B C. Wright et al., *Federal Practice and Procedure* § 1807 (3d ed. 2012). Under the first step, the district court makes a preliminary determination whether the named plaintiff is similarly situated to the other employees on whose behalf the case was brought. If so, the district court "conditionally certifies" the class and exercises its discretion to facilitate notice, as this Court approved in *Hoffmann-La Roche*, 493 U.S. at 169-71. At the second stage, which is usually triggered when the defendant moves to "decertify" the collective action, the court determines whether the employees who have opted in are in fact similarly situated to the named plaintiff. *See, e.g.*, Pet. App. 8-12 (describing two-step certification process); *Sandoz* v. *Cingular Wireless LLC*, 553 F.3d 913, 915 n.2 (5th Cir. 2008) (same).

B. The Collective Action Complaint, Rule 68 Offer, and District Court Proceedings

1. In 2007, Laura Symczyk worked as a Registered Nurse for defendants Genesis HealthCare Corporation and ElderCare Resources Corporation. While working for Petitioners, Respondent was regularly required to perform compensable work during unpaid "meal breaks." JA 23.

On December 4, 2009, she filed this case. The first line of her complaint called it a "COLLECTIVE ACTION COMPLAINT." JA 21. It alleged that Petitioners violated the FLSA by automatically deducting thirty minutes from each employee's work time for meal breaks, regardless of whether the employee actually received an uninterrupted break for meals. JA 21-31. The complaint's first page stated that "Plaintiff, Laura Symczyk, on behalf of herself and others similarly situated alleges as follows." JA 21. Elsewhere, the complaint noted that it was being filed "on behalf of all non-exempt employees of Defendants whose pay is subject to an automatic meal break deduction even when they perform compensable work during their meal breaks." JA 23. It explained that such employees included nurses, secretaries, housekeepers, custodians, clerks, porters, medical underwriters, respiratory therapists, administrative assistants, nurses' aides, and others. *Id.*

2. Just 76 days later, on February 18, 2010, the defendants served Respondent with an offer of judgment under Federal Rule of Civil Procedure 68, asking that judgment be entered in her favor on the complaint "and all causes of action alleged therein" for $7,500, "exclusive of attorneys' fees and costs accrued to date." JA 55. The offer stated that "[t]his amount represents the total amount Defendants shall be obligated to pay on account of any liability claimed" in the complaint. *Id.*

Although the complaint had been brought on behalf of both Respondent and similarly situated employees (a class the complaint estimated to contain several thousand people, JA 27), Petitioners made clear that the amount offered was based only on the amount

Respondent could personally recover for the violation of her individual FLSA rights, not on the total that could be recovered in the case. JA 78-79. The offer further stated that there was no concession of liability. JA 55-56 ("This Offer of Judgment * * * is not to be construed as an admission that Defendants are liable in this action or that Plaintiff has suffered any damage.").

The letter accompanying the offer also specified that "[i]n accordance with Federal Rule of Civil Procedure 68, if Plaintiff has not accepted this Offer of Judgment in writing within ten (10) days after service, this Offer of Judgment shall be deemed withdrawn * * * ." JA 79. Respondent did not respond to the offer. Accordingly, the offer was considered withdrawn, and the parties proceeded with the case.

3. On March 10, 2010, following a pretrial conference, the court entered an order providing that the parties would have an initial ninety-day discovery period, after which Respondent would move for conditional certification of the collective action. JA 62. The order further specified that the court would allow an additional six-month discovery period after it ruled on the certification motion, "to commence at the close of any Court-ordered opt-in window." *Id.*

4. Less than two weeks later, on March 23, 2010, the defendants moved to dismiss for lack of subject-matter jurisdiction based on their now-defunct Rule 68 offer. JA 64. Although the case had been filed as a collective action and the defendants offered relief only to Respondent, and although Respondent had not accepted the offer and had not received any relief,

the district court agreed and dismissed the case with prejudice. Pet. App. 43, 45.[1]

The upshot is that this case was dismissed a half-year after it had been filed and before any additional plaintiffs had the opportunity to opt in. That dismissal, in turn, was based on nothing more than a lapsed Rule 68 offer that itself had been made just over two months after the case was filed.

C. The Court of Appeals' Decision

1. The Third Circuit reversed, in a unanimous opinion by Judge Scirica. The court accepted that "[a]n offer of complete relief will generally moot the plaintiff's claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation." Pet. App. 14 (quoting *Weiss* v. *Regal Collections*, 385 F.3d 337, 340 (3d Cir. 2004)). It held, however, that an offer to the named plaintiff in a collective action, made before the plaintiff moves for collective certification or other plaintiffs opt in, does not moot a case. Pet. App. 3.

2. The court explained that although Rule 68 was "designed 'to encourage settlement and avoid litigation,'" Pet. App. 14 (quoting *Marek* v. *Chesny*, 473 U.S. 1, 5 (1985)), in the class or collective action context, it "can be manipulated to frustrate rather than to serve these salutary ends." Pet. App. 15. The court noted that, in *Weiss*, 385 F.3d 337, it had

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[1] During briefing on the motion to dismiss, the district court signed a stipulated order that allowed Respondent to amend her complaint to include state-law claims. JA 88-89. After the district court concluded that the Rule 68 offer had rendered the FLSA claim moot, it declined to exercise supplemental jurisdiction over the state-law claims and dismissed them. Pet. App. 46.

resolved this tension between Rule 68 and Rule 23 class actions by applying the "relation back doctrine" and holding that "'[a]bsent undue delay in filing a motion for class certification * * * the appropriate course is to relate the certification motion back to the filing of the class complaint.'" Pet. App. 16 (quoting *Weiss*, 385 F.3d at 348).

The Third Circuit traced the "relation back" doctrine to *Sosna* v. *Iowa*, 419 U.S. 393 (1975), where this Court explained that under circumstances "in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion," certification may "'relate back' to the filing of the complaint" when the issue otherwise "would evade review." *Id.* at 402 n.11. The Third Circuit noted that the relation back principle "has evolved to account for calculated attempts by some defendants to short-circuit the class action process and to prevent a putative representative from reaching the certification stage." Pet. App. 18. "By invoking the relation back doctrine," it explained, "a court preserves its authority to rule on a named plaintiff's attempt to represent a class by treating a Rule 23 motion as though it had been filed contemporaneously with the filing of the class complaint." Pet. App. 19.

3. The court then considered whether the relation back doctrine applies in §216(b) actions. The court concluded that it does, pointing out that the only other court of appeals to address the question—the Fifth Circuit—had reached the same conclusion. Pet. App. 24-25. The court recognized the differences between Rule 23 class actions and FLSA collective actions, noting that in an FLSA collective action each

party plaintiff must affirmatively opt in. The court determined, however, that "[a]lthough the opt-in mechanism transforms the manner in which a named plaintiff acquires a personal stake in representing the interests of others, it does not present a compelling justification for limiting the relation back doctrine to the Rule 23 setting." Pet. App. 25. The court explained that, like a Rule 23 class action, an FLSA collective action is "'acutely susceptible to mootness' while the action [is] in its early stages and the court ha[s] yet to determine whether to facilitate notice to prospective plaintiffs." Pet. App. 26 (quoting *Weiss*, 385 F.3d at 347).

4. The Third Circuit remanded the case to the district court. It noted that, should Respondent move for conditional certification on remand, the district court should consider whether the motion was made without undue delay, and if it finds it was, should relate the motion back to the date of the filing of the complaint. Pet. App. 28-29. On remand, Respondent moved for conditional certification. JA 10. Before ruling on the motion, the district court stayed all proceedings in the case in light of this Court's grant of certiorari. JA 12.

SUMMARY OF ARGUMENT

1. As an initial matter, this case is not moot because an unaccepted offer of judgment does not moot a case. Respondent effectively rejected Petitioners' offer of judgment when she did not accept it within the short time period specified under the terms of Fed. R. Civ. P. 68(b). "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox* v. *SEIU*, 132 S. Ct. 2277, 2287 (2012) (quotation marks omitted) (quoting *City of Erie* v. *Pap's A.M.*,

529 U.S. 277, 287 (2000)). Here, the offer of judgment *proposed* that the district court grant Respondent certain relief, but the court never did so. Instead, the court dismissed her claims as moot, and Respondent did not receive even a single penny of remuneration. Given these facts, the conclusion that Petitioners' Rule 68 offer mooted this suit would convert Petitioners' unaccepted offer into a "heads we win, tails you lose" proposition.

Even if a complete offer of judgment could otherwise moot an individual claim, Petitioners' offer was incomplete. Respondent sued on behalf of those employees to whom she is similarly situated, as authorized by 29 U.S.C. §216(b). But Petitioners' Rule 68 offer provided nothing whatsoever for those additional potential claimants. Courts cannot force a plaintiff to accept a suboptimal settlement, and an offer of complete individual relief in the collective action context does not fully satisfy the non-individual demands of the complaint. *See, e.g.*, *Deposit Guar. National Bank* v. *Roper*, 445 U.S. 326, 341 (1980) (Rehnquist, J., concurring). Without an offer of relief to the similarly situated employees on whose behalf Respondent sought to proceed, Petitioners' Rule 68 offer did not in fact render it "impossible for a court to grant any effectual relief."

This conclusion is all the more compelling in suits arising under the FLSA, where courts must typically approve settlements for both individual and collective actions. Thus, even if Petitioners' Rule 68 offer had also encompassed the claims of those similarly situated employees on whose behalf Respondent sought to proceed, it could not have automatically mooted Respondent's §216(b) claim because the court

must make an independent judgment of whether the relief offered to the prevailing party is effectual.

2. This Court has recognized that, in addition to their own claims, the lead plaintiffs in class actions have a distinct personal stake in pursuing certification under certain circumstances, *see United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388 (1980), and that otherwise allowing defendants to use offers of judgment to "pick[] off" named plaintiffs before they could obtain a ruling on class certification would be "contrary to sound judicial administration," *Roper*, 445 U.S. at 339. Petitioners offer no coherent reason to reach a contrary result in suits under §216(b). Indeed, Congress expressly included a collective-action device in §216(b) to facilitate the efficient resolution of claims. That legislative choice would be thwarted by Petitioners' construction of Rule 68.

Furthermore, as Judge Scirica's opinion for the court below concluded, the relation back doctrine prevents this case from being moot. In *Sosna*, this Court recognized that where a named plaintiff's claims become moot before the district court can "reasonably be expected to rule on a certification motion," the claims of as-yet uncertified class members may relate back to the filing of the complaint and thereby preserve live class action controversies. 419 U.S. at 402 n.11. Thus, where the relation-back doctrine applies, the fact that "the class was not certified until after the named plaintiffs' claims had become moot does not deprive [the Court] of jurisdiction." *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 52 (1991). The relation-back doctrine applies here, where the defendants made their Rule 68 offer

before the certification process could reasonably have been completed.

To be sure, collective and class actions use different procedures to determine the composition of the certified class. But that difference has no bearing on whether a properly completed certification process relates back. In collective actions, as in class actions, once the certification process is complete, there is a class of individuals whose interests are sufficient to create an Article III case or controversy even if the named plaintiff's claim has become moot. And in collective actions, as in class actions, there will be circumstances in which the named plaintiff's claim will become moot before the court can reasonably expect to complete the certification process.

Petitioners attempt to distinguish this case from *Roper* by contending that there were issues of costs present in the latter. But Petitioners' offer in this case similarly failed to extinguish Respondent's continuing interest in obtaining costs. Moreover, if the collective action were successful, plaintiff may have received an incentive award. *See Espenscheid* v. *DirectSat USA, LLC*, 688 F.3d 872, 877 (7th Cir. 2012).

District courts possess a wide variety of tools to manage collective actions under the FLSA. At bottom, Petitioners raise policy concerns, but the proper forum to address those concerns is Congress, which enacted §216(b) in 1938—and which has adhered to this understanding of collective actions ever since. The Court should not adopt a new rule of mootness that would constitutionalize this area of the law.

ARGUMENT

I. AN FLSA ACTION CANNOT BE RENDERED MOOT BY AN UNACCEPTED RULE 68 OFFER

A. An Unaccepted Offer of Judgment Does Not Render a Case Moot

There was only one offer of judgment in this case, and Respondent rejected it. As the district court put it, "[d]efendants contend, and Symczyk does not contest, that Symczyk 'never responded, effectively rejecting the Offer.'" Pet. App. 32 (citation omitted). Thus, Petitioners' position is that simply by making their offer of judgment, they mooted Respondent's claims, even though judgment was never entered on the terms offered and Respondent did not receive any of the offered relief.

Such a result would turn mootness doctrine on its head. This Court reaffirmed just last Term that "[a] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox*, 132 S. Ct. at 2287 (citation and internal quotation marks omitted). Here, the court could still have granted Respondent "effectual relief." Indeed, it could still grant her all the relief she sought. The offer *proposed* that the district court grant her relief, but the court never did; instead, it dismissed her claims as moot, and Respondent still has not received either a judgment or a single penny of relief.

Petitioners' mootness argument, if accepted, would create a paradox: By leaving Respondent without a penny in compensation while simultaneously failing to resolve her legal dispute with Petitioners, mooting the case would return both parties to the *status quo*

ante. Respondent would still have the same personal stake she had in the case to begin with, and the case would essentially be "unmooted." Petitioners' mere offer does not come close to satisfying their "burden of coming forward with the subsequent events that have produced th[e] alleged result" that this case is now moot. *Cardinal Chem. Co.* v. *Morton Int'l, Inc.*, 508 U.S. 83, 98 (1993).

Moreover, under Petitioners' theory, Respondent would not even have been able to *accept* the offer of judgment. According to Petitioners, once they made the offer, the case was moot and the federal judiciary had no jurisdiction. *See* JA 69-70. But if the court lacked jurisdiction, it could not have entered judgment in Respondent's favor, even if she had accepted the offer. Thus, Petitioners' position is that Respondent's claim was rendered moot because she was given a meaningless offer of something that she could never receive.

Even if a plaintiff could accept an offer under Petitioners' theory, their rule would present future plaintiffs with a Catch-22: Accepting a Rule 68 offer would mean giving up any hope of class-wide relief, but the only alternative would be dismissal. And in situations in which the amount of possible relief was unclear because discovery was necessary to determine the possible relief, plaintiffs would feel pressured to accept offers that were not complete out of fear that the district court would later determine that the offer had been a complete offer and dismiss the case.

This Court has never permitted a rejected Rule 68 offer to moot such an action. Petitioners have cited *Roper*, 445 U.S. at 332-33, for the proposition that an offer of judgment can moot a claim. Pet. 9. But in

Roper, the Court *entered* judgment in favor of the plaintiffs and tendered them relief, so the Court never reached the question of whether an offer of complete relief without judgment and tender of relief can moot a case. Indeed, in the collective action context, an offer of complete individual relief never fully satisfies the non-individual demands of the complaint, and a court cannot force a plaintiff to accept a suboptimal settlement. As then-Justice Rehnquist explained in his *Roper* concurrence:

> The action is moot in the Art. III sense only if this Court adopts a rule that an individual seeking to proceed as a class representative is required to accept a tender of only his individual claims. So long as the court does not require such acceptance, the individual is required to prove his case and the requisite Art. III adversity continues. Acceptance need not be mandated under our precedents since the defendant has not offered all that has been requested in the complaint (*i. e.*, relief for the class) and any other rule would give the defendant the practical power to make the denial of class certification questions unreviewable.

445 U.S. at 341 (Rehnquist, J., concurring). This case is far stronger than *Roper*, where "the District Court entered judgment in [plaintiffs'] favor, over [plaintiffs'] objection, and dismissed the action. The bank deposited the amount tendered into the registry of the court." *Id.* at 330 (majority opinion). Here,

Petitioners have not tendered, and Respondent has not received, so much as a penny.[2]

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[2] Petitioners claim (Pet. Br. at 4 n.3, 14 n.13) that Respondent conceded this issue. Respondent nowhere agreed that a *withdrawn* offer could moot a case, and Petitioners (at 4 n.3) use Respondent's statement that "[a]n offer of complete relief will generally moot the plaintiff's claim" to prove far too much. Respondent's language is by its terms general. It cannot mean that every offer moots every case, and it says nothing about offers that have expired or been withdrawn, or about whether FLSA cases can be mooted. To the contrary, Respondent specifically argued that the Rule 68 offer required a fairness review by the district court. *See infra* at 17-19. Petitioners also cite the framing of the question presented in the Brief in Opposition, but although that statement stated that the offer of judgment provided for complete relief on her individual claims, it did not agree that the offer mooted those claims, or that a rejected offer of judgment ever moots claims. And even if it had, that language again described only Petitioners' offer, not the fact that it had been withdrawn. Moreover, this Court has noted that "it is the petition for certiorari (not the brief in opposition and later briefs) that determines the questions presented." *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 280 (1993).

In any event, this Court has held that a respondent can seek affirmance of a ruling below on any ground raised below. *See, e.g.*, *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); *see also* Eugene Gressman et al., *Supreme Court Practice*, § 6.35, at 489 (9th ed. 2007). And the defects of the offer are a "predicate to an intelligent resolution" of the question presented and are fairly included within it. *Vance* v. *Terrazas*, 444 U.S. 252, 258 n.5 (1980); *see also Jones* v. *United States*, 527 U.S. 373, 397 n.12 (1999) (opinion of Thomas, J.).

While the defects in Petitioners' offer should have been pointed out in the Brief in Opposition, the issues here are jurisdictional and the Court can appropriately consider them. Indeed, if Petitioners were correct about both waiver and mootness, it would suggest that a party could waive (to its detriment) the existence of subject-matter jurisdiction.

[Continued]

The terms of Rule 68 itself confirm that a rejected offer cannot moot a case. Rule 68 states that "[a]n unaccepted offer is considered withdrawn." Fed. R. Civ. P. 68(b). Thus, Rule 68 makes clear that an unaccepted offer is not deemed accepted and treated as though the plaintiff had received the offered relief, even when she had not. Rather, it is deemed withdrawn and has no further role in the case except in a later proceeding to determine costs. Accordingly, by Rule 68's own terms, Petitioners' unaccepted offer was taken off the table, leaving Respondent with a claim that was still very much live.

B. Treating a Rejected Offer of Judgment as Though It Had Been Accepted and Judgment Entered on Its Terms Is Particularly Inappropriate in FLSA Cases

Treating an unaccepted Rule 68 offer as though it had been accepted is particularly inappropriate here, because this case arises in the FLSA context. Under the FLSA, *courts* must approve FLSA settlements (both for individual or collective actions); mere agreement of the parties is not conclusive. *See, e.g.*, *Lynn's Food Stores, Inc.* v. *United States*, 679 F.2d 1350, 1353 (11th Cir. 1982). The genesis of that rule lies in this Court's recognition, soon after the FLSA was enacted, that parties cannot waive FLSA rights, because "to allow waiver of statutory wages by agreement would nullify the purposes of the Act."

However, as the Court explained just last Term, "[w]hen a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented. Subject-matter jurisdiction can never be waived *or forfeited*." *Gonzalez* v. *Thaler*, 132 S. Ct. 641, 648 (2012) (emphasis added) (internal citation omitted).

Brooklyn Savings, 324 U.S. at 707. Because the FLSA is designed to prevent employees and employers from bargaining for inadequate wages and hours, Congress adopted "federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency." *Id.* at 706; *see also D.A. Schulte, Inc.* v. *Gangi*, 328 U.S. 108, 113-15 & n.8 (1946).

To effectuate this nonwaiver doctrine, district courts must engage in fairness review before approving settlement of FLSA disputes. Under this approach, "federal supervision replaces private bargaining." *Walton* v. *United Consumers Club, Inc.*, 786 F.2d 303, 306 (7th Cir. 1986) (Easterbrook, J.).[3] But no fairness review happened here, despite Respondent's requests to the district court (JA 110-12) and Third Circuit (JA 208-11).

The fairness review requirement suggests that Rule 68 offers are inapplicable to the §216(b) collective action context. By its plain language, Rule 68 circumscribes district court discretion. When a plaintiff accepts a defendant's Rule 68 offer to "allow judgment on specified terms," the clerk "*must* then

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[3] Fairness review is not tantamount to minimalist scrutiny. District courts conduct exhaustive analysis, often borrowing analogously from a six-factor settlement test for class actions under Rule 23(e), *see, e.g.*, *Collins* v. *Sanderson Farms, Inc.*, 568 F. Supp. 2d 714, 722 (E.D. La. 2008), to determine whether the outcome is fair and consistent with the "substantive labor rights underlying the claims," *id.* at 719. No similar process occurred here.

The only other process for private resolution of FLSA claims is 29 U.S.C. §216(c), which allows the Secretary of the Department of Labor to "supervise" a private settlement between an employee or group of employees and their employer. That process did not occur here, either.

enter judgment." Fed. R. Civ. P. 68(a) (emphasis added). That lack of discretion is at odds with the statutory purposes of the FLSA and this Court's nonwaiver doctrine. If parties can use Rule 68 agreements to short-circuit judicial scrutiny of FLSA settlements, they will achieve precisely what Congress sought to prevent: private contracting on wages and overtime. *Brooklyn Savings*, 324 U.S. at 706-07. Here, for example, under the rubric of Rule 68, Respondent would have to waive both her FLSA claim and her ability to pursue her §216(b) collective action in order to accept Petitioners' offer. Under Petitioners' view, this private offer and acceptance would occur absent any court or agency involvement—the very scenario this Court's nonwaiver doctrine is designed to prevent.

Such a result would also run headlong into the plain language of the Rules Enabling Act, which provides that the Federal Rules of Civil Procedure, including Rule 68, "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). As construed by Petitioners, Rule 68 would operate to "abridge" or "modify" the statutory right to judicial monitoring of settlement agreements. *See Rubery* v. *Buth-Na-Bodhaige, Inc.*, 494 F. Supp. 2d 178, 181 (W.D.N.Y. 2007) (expressing concern that "a Rule 68 offer may be wielded as a strategic weapon to frustrate the FLSA's very object").

Petitioners argued below that because they made a Rule 68 offer of judgment, rather than an offer of settlement, district court review was unnecessary. JA 419-20. But that is a distinction without a difference; as this Court repeatedly has noted, Rule 68 is nothing more than a procedural device to formalize settlement offers. *See, e.g., Marek*, 473 U.S.

at 5 (stating that Rule 68 is designed to "encourage settlement"); *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 350 (1981). Forgoing fairness review of Rule 68 offers provides employees and employers a license to strike private bargains, even though the FLSA "is designed to prevent consenting adults from transacting about minimum wages and overtime pay." *Walton*, 786 F.2d at 306. These concerns, which are always weighty, are at their apogee in the context of a collective action,[4] since a court reviewing an agreement may consider greater interests than those of the individual plaintiff. Because no fairness review occurred here, Petitioners' Rule 68 offer has no legal effect, and Respondent's suit is not moot.

II. AN OFFER OF JUDGMENT THAT OFFERS RELIEF ONLY WITH REGARD TO A REPRESENTATIVE PLAINTIFF'S INDIVIDUAL CLAIMS DOES NOT MOOT AN FLSA COLLECTIVE ACTION

Even if an unaccepted offer of judgment could moot an individual action, it would not moot this case—which was brought not just on behalf of Respondent, but as a collective action. Article III does not compel courts to dismiss collective actions as moot where the defendant has sought to pick off the named plaintiff through a Rule 68 offer of judgment that offers no relief to the similarly situated employees on whose behalf the case was brought. *See Roper*, 445 U.S. at 339 (explaining that allowing defendants to use offers

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[4] Indeed, even in the Rule 23 context, where Congress has not required court or executive agency approval of settlements, many courts have refused to apply Rule 68. *See, e.g., Schaake* v. *Risk Management Alternatives, Inc.*, 203 F.R.D. 108, 111 (S.D.N.Y. 2001) ("[I]t has long been recognized that Rule 68 Offers of Judgment have no applicability" to class actions).

of judgment to "pic[k] off" named plaintiffs before a ruling on class certification could be obtained would be "contrary to sound judicial administration").

Mootness doctrine is grounded in Article III's "case-or-controversy limitation on federal judicial authority," *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000), which requires that an individual possess a personal stake in the litigation to bring suit. At the same time, the Court has recognized the "flexible character of the Art. III mootness doctrine." *Geraghty*, 445 U.S. at 400.

Petitioners argue that because they offered Respondent relief before other plaintiffs had an opportunity to opt in, no one had a personal stake when their Rule 68 offer was made, and this case became moot. But under certain circumstances, the fact "[t]hat the class was not certified until after the named plaintiffs' claims had become moot does not deprive [the Court] of jurisdiction." *McLaughlin*, 500 U.S. at 52.

Such circumstances exist here. First, §216(b) authorizes Respondent to maintain this case on behalf of herself *and* similarly situated employees. The Rule 68 offer did not resolve the collective action allegations in the complaint and therefore did not moot the case. Moreover, even if §216(b), standing alone, were insufficient to bring into the case the interests of the similarly situated employees on whose behalf the case was filed, this Court's jurisprudence clearly permits the use of the relation-back doctrine to relate the completed certification and opt-in process back to the filing of the collective-action complaint. And, finally, Respondent maintains a personal interest in the case proceeding as a collective action.

A. Rule 68 Should Not Be Read To Thwart Congress's Affirmative Choice in the FLSA To Enable Collective Actions

In enacting §216(b), Congress made an explicit affirmative choice in favor of collective actions. Yet Petitioners' brief quite tellingly eschews deep analysis of the FLSA. Because of §216(b), this Court need not break any new ground in this case—with respect to either Rule 68 or mootness. Rather, §216(b)'s text and history confirm Judge Scirica's decision below to apply to collective actions this Court's decisions holding that class actions are not moot even when the named plaintiff's claims become moot before class certification.

1. Congress Expressly Included a Collective Action Device in §216(b) To Facilitate the Efficient Resolution of Claims

Congress had a wide variety of enforcement mechanisms from which to choose when it designed the FLSA. Ultimately, Congress selected the collective action as the best means to promote the efficient resolution of workers' claims and to facilitate workers' ability to present their claims in court. *Every* enacted version of the FLSA has included a collective-action device. Congress has amended FLSA over a dozen times, but has declined to disturb the "similarly situated" phrase. Rather, Congress has employed it in other legislation. *See* 29 U.S.C. §626(b) (ADEA). As this Court has underscored, "Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively." *Hoffmann-La Roche*, 493 U.S. at 170. Even after *Hoffmann-La Roche*'s strong endorsement of the district court's discretion to manage collective-action

procedures, Congress did not see fit to alter the "similarly situated" language.

Collective actions "allow employees to redress violations that otherwise could not be remedied." Br. for the Sec'y of Labor and EEOC as Amicus Curiae at 7, *In re D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (Jan. 3, 2012). "Because the Department of Labor has limited resources, it can enforce the FLSA only in a fraction of cases involving violations. Collective actions are a necessary complement to the Department's enforcement * * * ." *Id.*; *see also* Douglas D. Scherer & Robert Belton, Symposium, *Introduction: Class and Collective Actions in Employment Law*, 10 Emp. Rts. & Emp. Pol'y J. 351, 351 (2006) ("Collective actions are crucial for effective enforcement of the FLSA."). Although some employees bring their claims individually, many others cannot bring their claims at all. Their potential remedy is too small, or they cannot find representation, or they fear employer retaliation if they act on their own, or they do not understand their rights well enough to file an action on their own behalf.

Although a §216(b) collective action is not identical to a Rule 23 class action,[5] the two forms share many features. At the time of the FLSA's enactment, the term "similarly situated" was strongly associated with the class action. *E.g.*, *Saxton* v. *W.S. Askew Co.*, 35 F. Supp. 519, 521 (N.D. Ga. 1940). Congress intended §216(b)'s collective-action mechanism to serve the key purposes of class actions—efficiency,

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[5] The Advisory Committee expressly stated in 1966 that Rule 23's standards were not meant to alter the treatment of §216(b). Fed. R. Civ. P. 23 advisory committee's note ("The present provisions of [§216(b)] are not intended to be affected by Rule 23, as amended.").

the easing of burdens on litigants, and the facilitation of suits that redress legal injuries of relatively small pecuniary value. *Compare Hoffmann-La Roche*, 493 U.S. at 170 (discussing the "lower individual costs" and "efficient resolution" resulting from §216(b)'s system), *with Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1440 (2010) (plurality opinion) (recognizing that Rule 23 is "designed to further procedural fairness and efficiency"). It was that similarity which led *Hoffmann-La Roche* to incorporate Rule 23's notice principles into the §216(b) context—even though Rule 23 mentions notice and §216(b) does not. 493 U.S. at 169-70. In reaching this conclusion, the Court grounded its analysis in the purposes of §216(b). Writing for the Court, Justice Kennedy explained that a collective action provides FLSA plaintiffs with "the advantage of lower individual costs to vindicate rights by the pooling of resources." *Id.* at 170. Collective actions also benefit the judicial system, offering a means for the "efficient resolution *in one proceeding* of common issues of law and fact arising from the same alleged discriminatory activity." *Id.* (emphasis added).

The statute's history confirms the Court's reading. In weighing how to enforce FLSA rights, Congress believed that a collective-action mechanism was crucial. On the one hand, requiring each individual to bring a claim would place too great a burden upon employees. On the other, defending hundreds or even thousands of individual lawsuits would place too great a burden upon employers and courts. For example, Chairman of the House Committee on Labor William Connery, who introduced the House bill, was concerned with the "multifariousness" of potential lawsuits, asking an expert what would happen if "a thousand men" brought suit. *Joint*

Hearings Before the S. Comm. on Educ. & Labor and the H. Comm. on Labor on S. 2475 and H.R. 7200, 75th Cong., at 461 (1937). *See also id.* at 69 (statement of Rep. Albert Thomas) ("[I]t is going to put an undue burden on the dockets of the Federal court"). Witnesses, including then-Assistant Attorney General Robert Jackson, testified in response that these were exactly the problems that the collective-action device addressed. *See, e.g., id.* at 70 ("[I]f you had a hundred employees in one factory, and you take an assignment of all of their claims, the very purpose of this was to avoid a multiplicity of actions and to see that a single action was brought.").

The story did not change when, in 1947, Congress eliminated "representative actions" as part of the Portal-to-Portal Act of 1947, Pub. L. No. 80-49, 61 Stat. 84 (1947). Congress made that amendment to prevent unauthorized agents, who never possessed any FLSA rights themselves, from bringing suits on behalf of thousands of employees. At the same time, the 1947 amendments reaffirmed the ability of *employees* to bring collective actions on behalf of themselves or similarly situated coworkers. As Representative Samuel Hobbs explained, "The only thing we are after by that provision is the unauthorized suing for people who do not want it done." 93 Cong. Rec. 1,560 (1947).

To paraphrase Justice Brandeis, the most important thing Congress did in 1947 was what it did *not* do: abolish the collective action. To the contrary, Congress took great care to reaffirm the availability of a collective action as a means of enforcing FLSA rights. The committee reports stated that "[c]ollective actions brought by an employee or employees (a real party in interest) for and in behalf of himself or themselves

and other employees similarly situated *may continue* to be brought in accordance with the existing provisions of the Act." H.R. Rep. No. 80-326, at 13 (1947) (Conf. Rep.) (emphasis added); S. Rep. No. 80-37, at 48; S. Rep. No. 80-48, at 49; *see also* 93 Cong. Rec. 2289 (1947) (statement of Senator Patrick McCarran) (noting that the bill "would have the effect of eliminating representative actions, while maintaining authority for collective actions").

The persistence of the FLSA's "similarly situated" language signals Congress's unwavering commitment, for three-quarters of a century, to the collective-action device—both before and since *Hoffmann-La Roche*. The approach has endured despite the many changes to other portions of §216(b) and to Rule 23's stipulations for class actions. If such a longstanding policy is to be substantially modified, it should be by the legislature, rather than through judicial creation of a quasi-constitutional barrier under the rubric of mootness.

2. *Petitioners' Rule Would Defeat the Legislative Purpose for Collective Actions Established by §216(b)*

The text, structure, and legislative history of §216(b) make clear that Congress intended the collective-action device to promote efficient resolution of claims. Petitioners' attempt to pick off Respondent's claims undercuts Congress's carefully crafted system. They seek to manipulate Rule 68 to deny similarly situated employees a genuine chance to opt in to the suit—even though that is precisely the approach that Congress provided. This Court soundly rejected the tactic of picking off named plaintiffs prior to a decision on class certification in *Roper*, and the case for doing so is even stronger in the §216(b) context.

After all, the FLSA was meant to protect those employees whose bargaining power vis-à-vis their employers was weakest; such employees have a special need for the bargaining advantages of large-scale litigation. Efficiency considerations may also be heightened, because claims for lost wages may be relatively small, and the costs of litigation may be prohibitive for the individual. And whereas class actions proceed under a federal rule, §216(b) reflects an express, carefully considered, and continually calibrated legislative provision for collective suits.

The time-intensive nature of the opt-in process further underscores the importance of affording prospective plaintiffs a sufficient opportunity to join a suit. Although district courts have discretion to facilitate notice to possible plaintiffs, §216(b) itself does not mention notice. When available, notice is essential to realizing the efficiency goals of collective actions by making others cognizant of litigation. *See Hoffmann-La Roche*, 493 U.S. at 172 ("Court authorization of notice serves the legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action."). Pick-offs would prove particularly troublesome for collective actions under §216(b) because it takes time for a lead plaintiff to provide other employees with notice of the suit and for prospective plaintiffs to opt in.

The FLSA's statute of limitations would further make a "picking off" strategy particularly effective at insulating defendants from a collective action in an FLSA suit. Under the FLSA, the statute of limitations for a named plaintiff runs until the complaint is filed. 29 U.S.C. §256(a). For putative opt-in plaintiffs, however, the statute of limitations

continues to run until the new plaintiff files a written consent to join. *Id.* §256(b). Because of these provisions, a strategy of "picking off" successive individual plaintiffs would be particularly effective at insulating defendants from a collective action in an FLSA suit. With each successive mooting of a named plaintiff, the universe of potential plaintiffs who can opt in to the suit shrinks through the operation of the statute of limitations. As one court has put it:

> [D]efendants can bleed value out of a large pool of outstanding FLSA claims in a way they cannot with a comparable group of Rule 23 claims. "Picking off" §216(b) plaintiffs delays the point at which any collective action can be provisionally certified. This stalls notification to potential "similarly situated" parties. The longer it takes for an FLSA class to mature, the lower members' damages will be once they opt in, given the two-year limitations period.

Nash v. *CVS Caremark Corp.*, 683 F. Supp. 2d 195, 200 (D.R.I. 2010) (internal citation omitted).

In addition to depriving employees of the ability to join a collective action, as Congress intended, the outcome urged by Petitioners would upend the district court's ability to manage §216(b) collective-action proceedings. This Court has recognized the many benefits of district court involvement in §216(b)'s notice and certification process. Those benefits include ensuring that notice "is timely, accurate, and informative," "settling disputes about the content of the notice before it is distributed," countering "the potential for misuse of the class device," and "setting cutoff dates to expedite disposition of the action." *Hoffmann-La Roche*, 493 U.S. at 171-72. Lower courts, in turn, have established processes for

"managing collective actions in an orderly fashion," *id.* at 173, and accordingly have set forth schedules for discovery and certification motions, *see, e.g.*, JA 62 (district court scheduling order).

If defendants can unilaterally moot collective actions early in the case, however, plaintiffs will rush to provide (inevitably haphazard) notice to the other similarly situated employees they can identify—likely before the district court has the chance to become involved. Defendants will then race to make offers of judgment before other plaintiffs have filed consent forms. And district courts will be deprived of the ability "'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Hoffmann-LaRoche*, 493 U.S. at 173 (citation omitted).[6] Here, for example, the district court set a precertification discovery schedule of ninety days, but the Rule 68 offer was allowed to displace that schedule. The purpose of Rule 68, after all, is to encourage settlement, not to afford defendants an end-run around discovery. For that reason,

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[6] Moreover, under Petitioners' view, future plaintiffs will have every reason to front-load their allegations of similarly situated coworkers—and to thereby include allegations that fall below the pleading standards that this Court has understood Rule 8 to incorporate. Indeed, given this Court's insistence on allegations that are "plausible"—and the underlying justifications for such a rule articulated in both *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544 (2007)—it would seem entirely backward to sanction a regime in which plaintiffs must seek to preempt potential pick-offs through potentially overbroad (and under-substantiated) allegations in their original complaint. And it is often unfeasible for plaintiffs to file their motion for class certification alongside a complaint. *E.g.*, *Weiss*, 385 F.3d at 347–48; *Schaake*, 203 F.R.D. at 112; Fed. R. Civ. P. 23(c)(1) advisory committee notes (2003).

Respondent argued below that a Rule 68 offer cannot moot a case at least until discovery has taken place. JA 184, 208-11.

The threat of a Rule 68 pick-off is particularly problematic in FLSA suits because disagreements over the meaning of terms such as "similarly situated" complicate pre-certification discovery. *See Morgan* v. *Family Dollar Stores, Inc.*, 551 F.3d 1233, 1261 (11th Cir. 2008); *Acevedo* v. *Ace Coffee Bar, Inc.*, 248 F.R.D. 550, 554 (N.D. Ill. 2008) ("Collective actions under Section 216(b) necessitate a broader scope of discovery in order to identify similarly situated employees who may wish to opt-in to the suit."). The threat of such pick-offs encourages a "race to the courthouse" that serves neither litigants nor the courts.

To be sure, Rule 68 settlements can at times promote efficiency. But a Rule 68 pick-off that prematurely cuts off a suit altogether is antithetical to that goal. Rather than settling all claims in one suit, employers who seek to pick-off potential lead plaintiffs may have to settle many different claims individually. That is far less efficient, particularly for courts.

If there is any doubt about this danger, the facts of this case serve as a vivid reminder. *See supra*, at 4-6. Petitioners' theory would ensure that a plaintiff "effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained." *Roper*, 445 U.S. at 339; *see also id.* (stating that "[r]equiring multiple plaintiffs to bring separate actions * * * obviously would frustrate the objectives of class actions" and "would invite waste of judicial resources by

stimulating successive suits brought by others claiming aggrievement").

Congress created the FLSA three-quarters of a century ago. And although legislators have continued to modify the Act over the years, Congress has abstained from altering §216(b)'s provision for "similarly situated" individuals. That language forms the heart of the collective-action device. Petitioners' rule, which would enable a plaintiff to be picked off just a few weeks after filing a lawsuit, would subvert the §216(b) mechanism altogether.

B. Claims of As-Yet Uncertified Class Members Relate Back to the Filing of the Complaint and Thereby Avoid Mootness

It would be antithetical to the text, purpose, and history of §216(b) to allow a Rule 68 offer to moot a collective action. Because Petitioners' offer of judgment did not offer relief—or even the possibility of relief—to similarly situated putative opt-in plaintiffs, the case is not moot.

1. The Plaintiff's Allegations in the Complaint Control the Mootness Inquiry

The complaint in this case was called a "COLLECTIVE ACTION COMPLANT." JA 21. The $7500 offer, however, was derived solely from Respondent's individual harm. JA 77-79. Complete relief on all causes of action alleged in the complaint would necessarily have included compensation for all similarly situated employees on whose behalf the complaint was brought, a class estimated to contain thousands of people. JA 27.

Petitioners argue that because other employees must opt in to become party plaintiffs, the similarly situated employees are only "hypothetical claimants" whose claims cannot be taken into account in determining mootness. But the point of Respondent's argument is that these claimants are *not* hypothetical and that Congress has given her the chance to prove it. Respondent has alleged that this case is a collective action, brought not only on her own behalf, but on behalf of other similarly situated employees. If this case is a collective action, then, whether or not Respondent's individual claims are moot, the federal courts have jurisdiction. Thus, even if Respondent's claims would be moot if this case were an individual action, the federal courts maintain jurisdiction to reach the opt-in and certification stages as part of their jurisdiction to determine their jurisdiction. *See United States* v. *Ruiz*, 536 U.S. 622, 628 (2002); *see also Kircher* v. *Putnam Funds Trust*, 547 U.S. 633, 644 (2006) (noting that a federal court always has "authority to determine its own jurisdiction to deal further with the case").

This Court, just last Term in *Knox* v. *SEIU*, recognized that the allegations of a complaint control the mootness inquiry. In that case, the defendant, a labor union, claimed that it had provided all the relief the plaintiffs were due by sending each member of the class a dollar in the mail. This Court rejected that argument, saying it was the plaintiff's *allegations* that control the inquiry. 132 S. Ct. at 2287-88 (finding the case not moot because "Petitioners *argue* that the notice that the SEIU sent was improper" and because "petitioners *allege* that the union has refused to accept refund requests by fax" (emphasis added)).

In the class action context, a similar principle has been applied. For example, then-Justice Rehnquist found *Roper* not moot because "the defendant has not offered all that has been requested in the complaint (*i. e.*, relief for the class)." *Roper*, 445 U.S. at 341 (Rehnquist, J., concurring).[7] And in the §216(b) context, *Hoffmann-La Roche* acknowledged that putative plaintiffs' claims are not merely hypothetical, and it permitted discovery into the names and addresses of similarly situated employees on whose behalf a collective action was brought. It recognized that information about those employees was "relevant to the *subject matter* of the action" even before they opted in. 493 U.S. at 170 (emphasis added). In other words, from the time a collective action is filed, the collective action allegations are part of the "subject matter of the action." *Id.*

What was true in *Knox* and *Roper*, which involved judge-made class actions, is far truer here, where Congress has expressed a clear policy preference that FLSA actions be undertaken collectively under §216(b).

2. *Under This Court's Jurisprudence, the Completed Certification and Opt-in Process Relate Back to the Filing of the Collective Action Complaint*

Notwithstanding the collective action allegations in Respondent's complaint, Petitioners maintain that this case is moot because the certification process has

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[7] The majority in *Roper* similarly looked to *allegations*, allowing the named plaintiffs' assertions of an economic interest to satisfy the personal-stake requirement, even in the face of evidence that the named plaintiffs retained no actual economic interest. *See* 445 U.S. at 334 n.6; *id.* at 336.

not yet happened. But when a controversy with a named plaintiff becomes moot before there was a reasonable opportunity for the certification process to run its course, "the 'relation back' doctrine is properly invoked to preserve the merits of the case for judicial resolution." *McLaughlin*, 500 U.S. at 52. Here, the completed certification and opt-in process relate back to the filing of the collective action complaint. Accordingly, this case is not moot.

This Court first discussed the relation back of certification in *Sosna* v. *Iowa*, 419 U.S. 393 (1975), a class action challenge to Iowa's one-year residency requirement for bringing divorce proceedings in its state courts. Although the named plaintiff had lived in Iowa for more than one year by the time the case reached this Court, then-Justice Rehnquist's opinion for the Court held the case not moot due to its class action status. *Id.* at 402. The Court explained that "[t]here may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion." *Id.* at 402 n.11. "In such instances," the Court continued, "whether the certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review." *Id.*

In the years since *Sosna*, this Court has applied the relation-back doctrine to preserve jurisdiction over claims that are "'so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires.'" *McLaughlin*, 500 U.S. at 52 (quoting *Geraghty*, 445

U.S. at 399). For example, in *McLaughlin*, the Court applied the relation-back doctrine to a case challenging the manner in which a county provided probable cause determinations to people arrested without a warrant, holding that the case was not moot even though the named plaintiffs had all received probable cause determinations or been released by the time the class was certified. *Id.*

Likewise, in *Swisher* v. *Brady*, 438 U.S. 204, 213 n.11 (1978), a class challenge to a rule allowing the State to file exceptions to proposed findings made by masters of the juvenile court, the Court applied the relation-back doctrine to hold that the case was not moot even though the State had either withdrawn its exceptions or completed the adjudicatory process with regard to all the named plaintiffs before the district court certified the case. *See also Gerstein* v. *Pugh*, 420 U.S. 103, 110 n.11 (1975) (holding that a class action challenging various aspects of pre-trial detention in Florida was not moot even though it was not clear whether the named plaintiffs' claims had been mooted before any unnamed class members formally became part of the proceedings).

Because certification may relate back to the filing of the class action complaint, the timing of certification "is not crucial" to the mootness inquiry. *Geraghty*, 445 U.S. at 398. Where the relation-back doctrine applies, the fact that "the class was not certified until after the named plaintiffs' claims had become moot does not deprive [the Court] of jurisdiction," *McLaughlin*, 500 U.S. at 52, even though such unnamed members of a putative class are not parties to the litigation until after a class is certified. *See Smith* v. *Bayer Corp.*, 131 S. Ct. 2368, 2379 (2011).

As the Third Circuit correctly held, the relation-back doctrine properly applies here. If Rule 68 offers to named employees render collective actions moot, defendants could unilaterally moot collective actions as soon as they were filed, preventing the court from being able to "rule on a certification motion," *Sosna*, 419 U.S. at 402 n.11, thwarting the opt-in process, and precluding any appellate review of adverse decisions to that effect by the district court.

This case perfectly illustrates the problem. At the time of the offer, Respondent had not yet moved for conditional certification (as Petitioners note at 24), and for good reason: The district court had not yet set the schedule pursuant to which she would engage in discovery concerning the pool of potential opt-in plaintiffs (a period that was ultimately set for ninety days). Only after that ninety-day period was she to move for certification. Petitioners truncated that process by filing their Rule 68 offer. The failure to certify a class, contrary to Petitioners' intimations, had nothing to do with a lack of vigorous advocacy, and everything to do with respecting the rules laid down by the district court.[8] To permit a Rule 68 offer to terminate the whole case before it has even begun is tantamount to allowing defendants to "play ducks and drakes with the judiciary." *Baker* v. *Carr*, 369 U.S. 186, 268 (1962) (Frankfurter, J., dissenting). If such an offer rendered the collective action moot, defendants could successively manipulate federal court jurisdiction, keeping the matter from ever being resolved as a collective action. Under these circumstances, the completion of the certification and opt-in process should relate back to the filing of the

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[8] This case does not involve a dilatory plaintiff, where the result may be different. *See Espenscheid*, 688 F.3d at 874.

collective action complaint "to preserve the merits of the case for judicial resolution." *McLaughlin*, 500 U.S. at 52.

3. *The Court of Appeals Correctly Applied the* Sosna *Line of Cases to Collective Actions Under §216(b)*

Although the relation-back doctrine formed the basis for the Court of Appeals' decision, *see* Pet. App. 28, Petitioners address *Sosna* only in a footnote, contending that it has "no apparent independent relevance" because "the dispute here is not 'capable of repetition' between the same *parties*." Pet. Br. 19 n.15 (emphasis added). But the relation-back doctrine is appropriate in the collective-action context "where otherwise the *issue* would evade review." *Sosna*, 419 U.S. at 402 n.11 (emphasis added).

What preserved jurisdiction in *Sosna*, after all, was not that the dispute was capable of repetition between the *same* parties, but that *other* members of the class were subject to the residency requirement. *See Sosna*, 419 U.S. at 400 (noting that although the durational requirement might not be enforced again against the named plaintiff, it would be enforced against other class members). And cases applying the relation-back doctrine since *Sosna* have focused on whether the issue remains live for the other similarly situated people on whose behalf the case was brought, not on whether it remains live for the named plaintiff. *See, e.g.*, *McLaughlin*, 500 U.S. at 52; *Swisher*, 438 U.S. at 213 n.11; *Gerstein*, 420 U.S. at 110 n.11. Here, Respondent has alleged the existence of similarly situated plaintiffs. She should have an opportunity to demonstrate that fact, and not have her lawsuit pretermitted on the basis of Petitioners' novel interpretation of mootness doctrine.

Petitioners also argue (at 19) that the claims in this case are not "inherently transitory." As this Court recognized in *Roper*, however, pick-off concerns render collective actions transitory in effect. 445 U.S. at 339. If a Rule 68 offer can moot a named plaintiff's claims against her will, "a decision on class certification could, by tender to successive named plaintiffs, be made just as difficult to procure in a case" like this one as in cases with "inherently transitory" claims. *Zeidman* v. *J. Ray McDermott & Co.*, 651 F.2d 1030, 1050 (5th Cir. Unit A July 1981). Where the defendants can "pay off successive named plaintiffs, the defendants would have the option to preclude a viable class action from ever reaching the certification stage. This result is precisely what the relation back doctrine * * * condemns, and [there is] no difference when it is caused by the defendant's purposive acts rather than by the naturally transitory nature of the controversy." *Id.*

In a recent decision, *Pitts* v. *Terrible Herbst, Inc.*, 653 F.3d 1081 (9th Cir. 2011), Judge Bybee, for a unanimous panel, reiterated this precise point, ruling that a timely motion for class certification made after the individual plaintiffs received a Rule 68 offer of judgment would relate back to the time the action was filed. As the Ninth Circuit explained, "a claim transitory by its very nature and one transitory by virtue of the defendant's litigation strategy share the reality that both claims would evade review." *Id.* at 1091. That is to say, this Court's mootness analysis does not turn on *why* a claim for collective relief is transitory; it merely turns on the fact that it *is* transitory, through no fault of the plaintiff's. In short, "this set of facts fits within a 'narrow class of cases' where a contrary rule would lead to the 'reality' that 'otherwise the issue would evade review,'" and,

accordingly, the Court's "precedents provide for the maintenance of this action." *Roper*, 445 U.S. at 341-42 (Rehnquist, J., concurring) (quoting *Sosna*, 419 U.S. at 402 n.11, and *Gerstein*, 420 U.S. at 110 n.11).

Petitioners also assert that, because this case concerns the FLSA and not Rule 23, the *Sosna* line of cases does not apply. There are, of course, differences between FLSA collective actions and Rule 23 class actions, but they do not affect the applicability of the relation-back doctrine.

To be sure, as Petitioners stress, similarly situated employees in FLSA collective actions must "opt in" by filing written consent with the court, and they are not bound by the judgment if they do not file such consent. *See* 29 U.S.C. §216(b). But the relation-back doctrine is not, at bottom, about whether employees who bring collective actions have the "power to bind those who do not appear." Pet. Br. 9. Rather, the relation-back doctrine is concerned with the people who *are* included in the class at the *end* of the certification process. Under relation back, those individuals who are part of the class when the certification process is complete are deemed to have been full participants in the case from the beginning.

Moreover, that people who are not part of the class are not bound by the results of the case is not a difference between collective and class actions: In both FLSA collective actions and Rule 23 class actions, individuals who are not included within the class at the end of the certification process are not bound by the case's result, whether they are not included because they are not similarly situated, or because they did not opt in (in an FLSA case), or because they opted out (in a Rule 23 class action).

Put differently, the main difference between collective and class actions arises from the procedures used to determine the composition of the certified class. That difference has important implications for civil practice, but it has no relevance to whether a properly *completed* certification process relates back. In collective actions, as in class actions, once the certification process is complete, there is a class of individuals whose interests are sufficient to create an Article III case or controversy even if the named plaintiff's claim is moot. And in collective actions, as in class actions, there will be circumstances in which the named plaintiff's claim will become moot before the court can reasonably expect to complete the certification process. *See Sandoz*, 553 F.3d at 920 ("The status of a case as being an 'opt in' or 'opt out' class action has no bearing on whether a defendant can unilaterally moot a plaintiff's case through a Rule 68 offer of judgment."). Accordingly, in collective actions, as in class actions, the relation-back doctrine should apply to relate the completed certification process back to the filing of the complaint so that the process can be allowed to play out properly.

Congress's express authorization of collective actions under §216(b) militates only further in favor of a view of mootness at least as flexible as that recognized in the class action context. Class action suits proceed pursuant to rules promulgated under the Rules Enabling Act, *i.e.*, rules that "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). Although Congress lacks the authority to authorize judicial resolution of cases falling outside of Article III's case-or-controversy requirement, *see, e.g.*, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), Congress certainly has the power to relax prudential constraints on the judicial

power, *see, e.g.*, *Md. People's Counsel* v. *FERC*, 760 F.2d 318, 322 (D.C. Cir. 1985) (Scalia, J.), and to exercise at least some control over the parameters of a "case" or "controversy," *see FEC* v. *Akins*, 524 U.S. 11, 22-25 (1998).

As such, Congress's direct involvement renders the relation-back doctrine especially appropriate here, because allowing defendants unilaterally to deprive federal courts of jurisdiction over collective actions would directly thwart congressional policy. Applying the relation-back doctrine helps ensure that defendants will not be able to cut collective actions short, and that employees will be able to maintain cases on behalf of "themselves and other employees similarly situated" in the manner envisioned by Congress. *See Hoffmann-La Roche*, 493 U.S. at 173 ("The broad remedial goal of the statute should be enforced to the full extent of its terms.").

Finally, despite Petitioners' efforts to the contrary, it bears emphasizing that the line of cases beginning with *Sosna* sits comfortably within this Court's approach to mootness, which is to insist upon a personal stake requirement but to adapt that requirement to fit unusual situations. In particular, the Court has long recognized that cases are not moot when the defendant has voluntarily ceased the challenged conduct, *see, e.g.*, *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953), and when the challenged action is "capable of repetition, yet evading review." *See, e.g.*, *S. Pac. Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911).

Both the "capable of repetition, yet evading review" and "voluntary cessation" exceptions to mootness show a concern with issues that arise repeatedly, but have a tendency to evade court review by becoming

moot prior to judicial resolution. Under the voluntary cessation doctrine, "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). "[I]f it did, the courts would be compelled to leave [t]he defendant * * * free to return to his old ways." *Id.* at 289 n.10 (citation and internal quotation marks omitted). Similarly, the "capable of repetition, yet evading review" exception usually applies where "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Davis* v. *FEC*, 554 U.S. 724, 735 (2008) (internal quotation marks and citations omitted). The Court has recognized, however, that the exception may also apply where the controversy is capable of repetition, even when not between the parties to the original suit. *See Honig* v. *Doe*, 484 U.S. 305, 335-36 (1988) (Scalia, J., dissenting) (describing a number of cases as "dispensing with the same-party requirement entirely, focusing instead upon the great likelihood that the issue will recur between the defendant and the other members of the public at large without ever reaching us" (emphasis omitted)). As *Sosna* and its progeny make clear, claims for class relief fall into this latter category.

These exceptions reaffirm the flexibility of mootness doctrine. Petitioners' allusions to the contrary notwithstanding, "if mootness were simply 'standing set in a time frame,' the exception[s] to mootness * * * could not exist." *Laidlaw*, 528 U.S. at 190; *see also Honig*, 484 U.S. at 330 (Rehnquist, C.J., concurring) ("If our mootness doctrine were forced upon us by the case or controversy requirement of Art. III itself, we

would have no more power to decide lawsuits which are 'moot' but which also raise questions which are capable of repetition but evading review than we would to decide cases which are 'moot' but raise no such questions.").[9]

Moreover, these exceptions reaffirm the general extent to which defendants should not be able to manipulate federal court jurisdiction to ensure that their actions are unreviewable. *Cf. Pap's A.M.*, 529 U.S. at 288 (noting that the Court's "interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness"). Otherwise, courts' efforts would be wasted on cases that never reach judicial resolution. *See Laidlaw*, 528 U.S. at 191-92 (discussing "sunk costs" to the judicial system as a reason for the differences between standing and mootness). And the parties and public would never have "the legality of the practices settled." *W.T. Grant Co.*, 345 U.S. at 632.

Like the situations in which these exceptions apply, if Petitioners' offer rendered this case moot, defendants would be able to manipulate jurisdiction by violating the minimum-wage and overtime rights of their workforces, then making offers of judgment

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[9] *See also United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 & n.2 (1950). *Munsingwear* stands for the proposition that a "party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not *in fairness* be forced to acquiesce in the judgment." *U.S. Bancorp Mortgage Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 (1994) (emphasis added). Such fairness concerns would be irrelevant if Article III inflexibly barred any subsequent exercise of the judicial power once a case became moot.

seriatim to any employees who brought collective actions, ensuring that they never have to face class-wide liability. They would "invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement." *Roper*, 445 U.S. at 339. And, even if the defendants had committed widespread violations, they could avoid having "the legality of the practices settled." *W.T. Grant Co.*, 345 U.S. at 632. In short, the considerations that underlie the "capable of repetition, yet evading review" and "voluntary cessation" mootness exceptions apply here as well, reinforcing the conclusion that Petitioners' Rule 68 offer did not moot the case.

Indeed, the relation-back doctrine can be understood as an application of the "capable of repetition, yet evading review" exception in the specific context of a pre-certification collective/class action. Like the exception, the relation-back doctrine focuses on whether the underlying issue will arise again, since "[t]he question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government." *Flast* v. *Cohen*, 392 U.S. 83, 100 (1968). And like that exception, it looks to whether the issue will evade review if the case is declared moot. When translated into the collective action context, the doctrine requires that other similarly situated individuals be subject to the violation about which the named plaintiff complained, rather than requiring that the named plaintiff herself be expected to be subject to that same violation.

Simply put, the court of appeals' use of the relation-back doctrine in this case is not only

consistent with *Sosna* and its successors, but is entirely faithful to the core principles undergirding this Court's mootness jurisprudence—principles that compel the result reached by Judge Scirica's opinion below.

C. Respondent Has an Independent Personal Stake in Bringing a Collective Action

1. Even apart from the relation-back doctrine, this case is not moot because Respondent has a personal stake in the case's proceeding as a collective action. In *Roper*, 445 U.S. 326, the Court considered whether named plaintiffs could appeal the denial of class certification where the district court had entered judgment in their favor on a rejected offer of judgment and the defendants had deposited the amount tendered in the court's registry. Determining that resolution of the issue "require[d] consideration only of the private interest of the named plaintiffs," the Court held that "[n]either the rejected tender nor the dismissal of the action over plaintiffs' objections mooted the plaintiffs' claim on the merits so long as they retained an economic interest in class certification." *Id.* at 332-33. The Court found such an interest in the named plaintiffs' "desire to shift to successful class litigants a portion of those fees and expenses that have been incurred in this litigation." *Id.* at 334 n.6.

Likewise, Respondent has a continuing economic interest in this case. To begin with, Petitioners' Rule 68 offer of judgment was expressly "exclusive of attorneys' fees and costs accrued to date" and "represent[ed] the total amount Defendants shall be obligated to pay on account of any liability claimed herein." JA 80. Accordingly, the offer did not make her whole, and the district court should have

maintained its jurisdiction over the case. A separate letter accompanying the offer, however, stated that the offer was for "$7,500.00 in alleged unpaid wages, plus attorneys' fees, costs and []expenses as determined by the Court." JA 79.[10] But even this version of the offer did *not* settle the scope of attorneys' fees, costs, and expenses, leaving those issues—in which Respondent unquestionably has a personal stake—for subsequent resolution by the district court. *Cf. Townsend* v. *Benjamin Enters.*, 679 F.3d 41, 58-60 (2d Cir. 2012) (rejecting a challenge to an award of attorney's fees that accrued after the rejection of a Rule 68 offer). The Petitioners' offer thus created two unresolved issues—(1) which writing represented the actual offer, and (2) how large the fees and costs would be if "determined by the Court"—each of which presents an independent reason why she continues to have an individual, personal stake.

Moreover, even apart from these unresolved questions, Respondent has a continuing interest in fees because Petitioners did not offer all of the fees Respondent could be awarded for the work already completed in the case. If Petitioners offered fees at all, they offered an amount of fees that would be determined by the district court. JA 77. A court considering fees in a case brought as a collective

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[10] It was and remains unclear how Petitioners calculated these fees and costs. Petitioners' offer for $7,500 was based on a calculation of unpaid wages and liquidated damages of $6,900. JA 78-79. If Petitioners intended the offer's residual $600 to cover the entirety of Respondent's fees, costs, and expenses, such a calculation is surely inadequate given the amount of the filing fee alone. *See* JA 1 (Docket Entry #1, indicating that Respondent paid a $350 filing fee).

action, but in which judgment was entered before the certification process took place, might not award full fees for all time already spent on the case, because the collective action allegations were not successful. *See, e.g., Barfield* v. *N.Y.C. Health & Hospitals Corp.*, 537 F.3d 132, 151-52 (2d Cir. 2008) (upholding the reduction of fees for failure to secure certification of a collective action). However, if that same case proceeded through certification and was successful on behalf of a class, the court might award full fees for that same time spent. In other words, the amount of fees awarded for time already spent on the case may be greater if the case proceeds as a collective action than if judgment were entered on the Rule 68 offer. Thus, as in *Roper*, Respondent has a continuing interest in "fees and expenses that have been incurred in this litigation." 445 U.S. at 334 n.6.

Moreover, the possibility of an incentive award gives Respondent yet another continuing economic interest in seeing this case proceed as a collective action. Courts have generally recognized that named plaintiffs can receive incentive awards at the conclusion of class action litigation to compensate them for their services to the class. *See, e.g.*, *Staton* v. *Boeing Co.*, 327 F.3d 938, 976-77 (9th Cir. 2003) (listing cases approving incentive awards in Rule 23 class actions). And as a unanimous Seventh Circuit opinion by Judge Posner recently explained, incentive awards for lead plaintiffs are equally appropriate under the FLSA given that named plaintiffs in FLSA collective actions and Rule 23 class representatives perform similar services and take on similar risks. *See Espenscheid,* 688 F.3d at 877 ("There is no relevant difference between the collective, consisting of opt-ins, and the class, consisting of class members minus the opt-outs" for incentive award purposes);

2 *Fair Labor Standards Act* 19-204-05 (Ellen C. Kearns et al. eds., 2d ed. 2010) ("[S]everal courts have approved significant incentive awards for class representatives in FLSA actions."). Respondent's potential entitlement to an incentive award provides her with a continuing personal stake beyond her individual damages. "The prospect of [an incentive] award is akin to a damages payment agreed in a settlement to be contingent on the outcome of the appeal; and the prospect of such a payment, though probabilistic rather than certain, suffices to confer standing." *Espenscheid*, 688 F.3d at 875 (internal citations omitted).[11]

2. Even if she did not have a continuing economic interest in the case, Respondent would still have a sufficient personal stake in the case for it to proceed. In *Geraghty*, this Court considered whether a prisoner who brought a class action challenge to the Parole Commission's parole release guidelines could appeal the denial of class certification after he was released from prison. The Court concluded that he could, holding that "an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied." 445 U.S. at 404. Even if his individual claim on the merits has expired, a named plaintiff can retain "a 'personal stake' in

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[11] *See also Leigh* v. *Bottling Grp., LLC*, No. 10–0218, 2012 WL 460468, at *7 (D. Md. Feb. 10, 2012) (noting that the lead plaintiff spent hours gathering information and that "the policy underlying the FLSA * * * would appear to be served by providing a modest incentive to plaintiffs who take such initiative and assume such risk"); *Diaz* v. *Scores Holding Co.*, No. 07 Civ. 8718(THK), 2011 WL 6399468, at *3 (S.D.N.Y. July 11, 2011).

obtaining class certification sufficient to assure that Art. III values are not undermined." *Id.*

Crucially, class certification in *Geraghty* had been *denied*, but the Court still deemed the case not moot. So long as the action might still be able to proceed as a class action (*e.g.*, if the denial of certification were reversed), the Court held, it presents a "dispute capable of judicial resolution." *Id.* at 403. In other words, the mere possibility that the denial of certification might be reversed was sufficient. And that holding was announced in a case where counsel for the plaintiff cheerfully admitted that his client could "obtain absolutely no additional personal relief." Oral Arg. Tr. at 25 (No. 78-572).

Here, Respondent retains a sufficient personal stake in this case proceeding as a collective action to allow it to continue. At all times in this case, Respondent sought to represent not only herself, but also other employees similarly situated, as authorized by §216(b). She has "continue[d] vigorously to advocate [her] right to have a class certified." *Geraghty*, 445 U.S. at 404. Indeed, although she personally would have benefited from accepting the Rule 68 offer, she did not accept it out of concern for the class obtaining relief. *See Roper*, 445 U.S. at 332 ("The factual context in which this question arises is important. At no time did the named plaintiffs accept the tender in settlement of the case."). Under these circumstances, "notwithstanding the rejected offer of judgment, the proposed [collective] action continues to involve 'sharply presented issues in a concrete factual setting' and 'self-interested parties vigorously advocating opposing positions,'" all of which is sufficient to satisfy Article III. *Lucero* v. *Bureau of*

Collection Recovery, Inc., 639 F.3d 1239, 1249 (10th Cir. 2011) (quoting *Geraghty*, 445 U.S. at 403).

Petitioners imply their disagreement with *Geraghty*, but they have not asked that it be overruled. And this case is, in fact, far easier than *Geraghty*. For although the *Geraghty* Court suggested that such a personal stake exists in the abstract, it certainly exists in cases such as this one—where Congress has expressly authorized individuals to proceed on behalf of others.

Petitioners (at 25) also claim that *Geraghty* "explicitly limited its decision to cases in which the trial court ruled on a certification motion *before* expiration of the plaintiff's claim." But *Geraghty* does not address a circumstance where, as here, a defendant precipitously sought to pick off a plaintiff before a class could be certified. And Petitioners' reading of *Geraghty*'s footnote 11 looks more plausible than it really is because they omit the first sentence of the following passage:

> The "relation back" principle, a traditional equitable doctrine applied to class certification claims in *Gerstein* v. *Pugh*, serves logically to distinguish this case from the one brought a day after the prisoner is released. *See* 1221 n.15. If the named plaintiff has no personal stake in the outcome at the time class certification is denied, relation back of appellate reversal of that denial still would not prevent mootness of the action.

445 U.S. at 404 n.11 (citation omitted). The language, when read as a whole, does not address a case (such as this one) in which a plaintiff undoubtedly had a personal stake when the complaint was filed. Rather, as the first sentence makes clear, the Court was

addressing a situation in which the plaintiff *never* had standing, even at the time she filed her complaint. Earlier language in the footnote confirms that the Court meant to rule out only "the extreme feared by the dissent": that plaintiffs who had never suffered "actual, concrete injury" would be granted standing. *Id.* Had Congress not abolished "representative actions" in 1947, *those* suits under the FLSA may have raised such concerns. But collective actions under the modern §216(b), where the original named plaintiff unquestionably had standing when she filed suit, are a different matter altogether.

Indeed, to read that one sentence in isolation, as Petitioners do, would render *Geraghty* inconsistent with cases decided both before and after it. *Gerstein* specifically noted that "the record does not indicate whether any of [the plaintiffs] were still in custody awaiting trial when the District Court certified the class." 420 U.S. at 110 n.11. And as *McLaughlin* explained, "[t]hat the class was not certified until after the named plaintiffs' claims had become moot does not deprive [the Court] of jurisdiction." 500 U.S. at 52.

In any event, there is no relevant difference between when the case is on appeal from the denial of class certification and when the district court has not yet had the opportunity to rule on class certification in the first instance: In both situations, there is a class of similarly situated people who have had a case brought on their behalf and who have a live controversy with the defendants, but who are not yet part of a certified class. Accordingly, in both situations, the plaintiff retains "a 'personal stake' in obtaining class certification sufficient to assure that

Art. III values are not undermined." *Geraghty*, 445 U.S. at 404.

Indeed, *Geraghty* illuminates Respondent's fundamental position: First principles of mootness do not bar this action. *Geraghty* began with those first principles, stating that the case or controversy requirement "limits the business of federal courts to 'questions presented in an adversary context['] * * * and it defines the 'role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.'" *Id.* at 396 (quoting *Flast*, 392 U.S. at 95). *Geraghty* recognized that in cases such as this, where the merits are not yet at issue, interference with separation of powers is at its least likely. *See id.* at 404 n.11 ("The judicial process will not become a vehicle for concerned bystanders * * * because the issue on the merits will not be addressed until a class with an interest in the outcome has been certified." (citation and internal quotation marks omitted)). And *Geraghty* held that, consistent with those first principles, a case brought on behalf of a class can continue even if the named plaintiff's claim becomes moot before a class is certified.

D. Petitioners' Policy Concerns Should Be Addressed to Congress and Do Not Justify Constitutionalizing a Remedy

At bottom, Petitioners and their *amici* lodge a policy objection to the decision below. They fear that it will cause suits to linger and reduce business certainty. Pet. Br. 7; Chamber Br. 11-12. These concerns are both unfounded and irrelevant. They are unfounded because the FLSA has operated for three-quarters of a century without such problems.

The Fifth Circuit has expressly held that pre-certification offers of judgment do not moot class actions since 1981, and many other courts have followed suit, yet Petitioners offer nothing to suggest that these decisions have actually created such problems. Moreover, to the extent that §216(b) ever provokes the concerns that Petitioners and their *amici* evoke, there is an easy solution: Pursue statutory amendment of §216(b) either to do away with the "similarly situated" action or to impose any number of other legislative limits.

Congress has not seen fit to act, however, and for good reason. District courts wield a wide variety of tools that address Petitioners' policy concerns. For example, district courts possess broad discretion to manage cases—a "power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis* v. *N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also* 28 U.S.C. §1657(a). And in the context of §216(b) specifically, this Court has recognized that "the potential for misuse of the class device * * * may be countered by court-authorized notice." *Hoffmann-La Roche*, 493 U.S. at 171; *see also id.* (describing several tools that district courts use to manage complex collective actions).

District courts already exercise considerable discretion over whether a class will be conditionally certified at the pre-trial stage and whether a class will remain certified after discovery. This "two-tiered analysis," Pet. App. 8, gives district courts an effective method for weeding out cases that do not merit collective action. The district courts have regularly exercised this authority. *See, e.g.*, *Jonites* v. *Exelon Corp.*, 522 F.3d 721 (7th Cir. 2008) (upholding

summary judgment for defendants where plaintiffs were not "similarly situated" under §216(b)); *Anderson* v. *Cagle's, Inc.*, 488 F.3d 945 (11th Cir. 2007) (similar). And they do all of this without constitutionalizing the question.

Far beyond the §216(b) procedural mechanisms endorsed in *Hoffman-La Roche* and other cases, district court judges can and do use local rules to ensure the timely and efficient management of collective action claims. *See, e.g.*, *Cichon* v. *Exelon Generation Co.*, 401 F.3d 803, 810 (7th Cir. 2005) (upholding district court's grant of summary judgment in a §216(b) case based in part on failure to comply with a local rule). Using this broad discretion, courts will look to their jurisdiction's local rules to determine whether a certification motion has been timely filed. *See, e.g.*, *In re Bicoastal Corp.*, 133 B.R. 252, 256 (Bankr. M.D. Fla. 1991).

Finally, even where courts manage their dockets without the benefit of a specific collective-action rule, they have used equitable doctrines such as laches to prevent undue delay in the filing of collective-action certification motions. *See, e.g.*, *id.*; *In re Fleet*, 76 B.R 1001, 1006 (Bankr. E.D. Pa. 1987). To the extent the Court is concerned about undue delay on the part of plaintiffs, it has a wide variety of options available well short of constitutionalizing a solution that will later be impossible for the political branches to alter. And if, notwithstanding these authorities, a problem exists, Petitioners have an obvious forum in which to pursue such remedies: Congress. After all, the legislature created this cause of action, and its concomitant preference for "collective" suits, in the first place.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted.

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APPENDIX

APPENDIX

1. The Fair Labor Standards Act, 29 U.S.C. §216(b), provides, in relevant part:

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

2. Federal Rule of Civil Procedure 68 provides:

(a) Making an Offer; Judgment on an Accepted Offer. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party

may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(b) Unaccepted Offer. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

* * *

(d) Paying Costs After an Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

REPLY BRIEF

No. 11-1059

IN THE

Supreme Court of the United States

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORP.,
Petitioners,

v.

LAURA SYMCZYK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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IN THE

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GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORP.,
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v.

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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

INTRODUCTION

The opening brief on the merits presented a simple and direct understanding of Article III: that a "Case" within the Constitution's grant of the judicial Power requires a plaintiff with a personal stake in the dispute. Because the only plaintiff in this case has conceded throughout the litigation that she has no further personal stake in her dispute with petitioners, the court of appeals erred in requiring the case to proceed. In this Court, respondent focuses her presentation on arguments and issues that were not raised in the brief in opposition and were conceded in the courts below. To the extent she does address the merits, respondent's arguments can be squared

neither with the Court's existing doctrine nor any coherent vision of Article III.

ARGUMENT

I. This Case Is Moot Because It Has No Plaintiff.

We start with the question presented in the petition, whether the vitiation of the interest of the only plaintiff in a collective action renders that action moot. On that question, respondent's counsel not only defend the analysis of the court below (Resp. Br. 47-51), but also interject three new reasons why the case might not be moot: under the *Sosna* doctrine (Resp. Br. 32-44); because of a special rule for mootness under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* (the "FLSA") (Resp. Br. 21-30); or because respondent has a continuing personal stake (Resp. Br. 44-47). After addressing the analysis of the court of appeals, we discuss the three new points in turn.

A. The Possibility of Future Collective Process Cannot Sustain a "Case" That Has No Interested Plaintiff.

The federal judicial Power is limited to "Cases" and "Controversies" among parties with a personal stake. Pet. Br. 10-29. The Court's conclusion that the dispute in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), remained justiciable turned on the Court's conclusion that the offer in that case did not provide complete compensation to the named plaintiffs. Pet. Br. 20-22. The Court's conclusion that the dispute in *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), remained justiciable turned on the district court's ruling on class certi-

fication *before* the vitiation of the plaintiff's interest in the dispute. Pet. Br. 22-25. Because the plaintiff in this case has conceded that she lost any interest in the case even before the filing of any motion regarding collective process, neither *Roper* nor *Geraghty* supports the decision of the court of appeals.[1] *See* DRI Amicus Br. 14-18.

Respondent argues (Resp. Br. 47-51) that a case is not moot under *Geraghty* "[s]o long as the action might still be able to proceed as a class action" (Resp. Br. 48). Because the district court had not yet ruled on the propriety of collective process when respondent lost any continuing interest in the dispute, the possibility of collective process had not yet been foreclosed when respondent lost her personal stake. Thus, respondent boldly contends, *Geraghty* in fact supports the decision of the court below. Resp. Br. 47-48. But that argument ignores the opinion of the *Geraghty* Court, which requires dismissal of this case because respondent lost her stake in the dispute before any decision on the propriety of collective process. *See* Pet. Br. 24-25 (discussing *Geraghty*, 445 U.S. at 407 n.11, and the emphasis of the *Roper* and *Geraghty* Courts on ensuring appellate review of trial court decisions on class certification); DRI Amicus Br. 25-27.

Respondent similarly contends that *Geraghty*'s discussion of the limits on the Article III power applies only to cases that were moot even before they were filed. Thus, she argues, no vitiation of a plaintiff's

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[1] Although the Solicitor General recommends affirmance on other grounds (*see* Point II, *infra*), he generally supports our analysis on the merits, SG Br. 25-32; *see* SG Br. 13 n.1 (discussing the earlier presentation of a similar position).

stake in a collective action can make a case moot so long as the plaintiff had a justiciable stake at the moment of filing. Resp. Br. 49-50. That contention is even harder to reconcile with *Geraghty*'s delineation of the outer boundary of justiciability in this context as requiring a personal stake not only at the time of filing, but through and including the time of the trial court's ruling on the propriety of collective proceedings. *See* Pet. Br. 13; DRI Amicus Br. 8.[1]

B. A Dispute Is Not Capable of Repetition That Evades Review When the Complaint Seeks Only Retrospective Relief.

The principal argument respondent presents in support of the decision below is that the possibility that collective process eventually might be appropriate renders irrelevant the presence or absence of an interested plaintiff before judicial resolution of that question. *See* Resp. Br. 32-44. The argument takes a set of cases designed for "exceptional situations" (*City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)), wrenches them from their context and justification, and posits a doctrinal rule of startling sweep. Among other things, it would mean that no defendant facing a collective action could resolve a case before certification, even if it is willing to pay complete relief to all existing plaintiffs.

Not surprisingly, the decisions of this Court provide scant support for that view. The doctrine first articulated in *Sosna v. Iowa*, 419 U.S. 393 (1975), serves a narrow purpose that has no application here:

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[1] *See also, e.g.*, *Camreta v. Greene*, 131 S. Ct. 2020, 2028 (2011); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 461-62 (2007).

to ensure that the doctrine of mootness does not prevent the adjudication of disputes that by their very nature are likely to dissipate before the judicial process would have an opportunity to provide the sought-after relief. Because the doctrine is limited to cases in which plaintiffs seek prospective relief, it does not apply in cases, like this one, seeking retrospective monetary relief.

The facts of the cases make this clear. *Sosna*, for example, presented a constitutional challenge to a one-year residency requirement. *Sosna*, 419 U.S. at 395. Similarly, in *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991), and *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Court considered challenges of pretrial detainees to the period of detention after a warrantless arrest; no individual plaintiff would remain in that class for a time sufficient for judicial attention. *See also, e.g.*, *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (case not moot where it "would be entirely unreasonable to expect * * * complete judicial review [of campaign advertisements] in time for [plaintiff] to air its ads"); *Swisher v. Brady*, 438 U.S. 204, 213 n.11 (1978) (concluding that "the rapidity" of the challenged process brought the case within the *Sosna* rule). *Compare Spencer v. Kemna*, 523 U.S. 1, 18 (1998) (rejecting application of *Sosna* because plaintiff "has not shown * * * that the time between parole revocation and expiration of sentence is always so short as to evade review").

The plaintiffs in the cases applying *Sosna* in the context of collective actions lost any personal stake in the dispute without obtaining the relief that they sought (a cessation of the allegedly unlawful

conduct).[3] A constitutional rule that such disputes could not proceed, even on a collective basis, would have meant that no potential plaintiff or group of plaintiffs could hope to obtain the sought-for relief, and that the defendants could continue to engage in the challenged conduct with impunity, screened from any need to comply without regard to the legality of their conduct. Unwilling to accept that result, the Court in *Sosna*, *Gerstein*, *Swisher*, and *Riverside* concluded that Article III's "Case" requirement in those exceptional circumstances permits further adjudication despite the lack of a continuing personal stake on the part of the existing plaintiffs.[4]

But that rule has nothing to do with this case. What matters is the nature of the dispute itself, not the defendant's reaction to it. Thus, for example, there is nothing "inherently transitory" about a dispute involving past underpayments under the FLSA. More generally, when the defendant offers complete relief, the proceeding is not one in which mootness leaves a plaintiff unable to obtain relief. To put it directly, this is not a dispute in which a defendant's recalcitrance "evaded review," for the simple reason that petitioners offered to provide complete relief.

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[3] *See Sosna*, 419 U.S. at 395 (injunctive relief against state residency requirement); *Gerstein*, 420 U.S. at 106-07 (probable cause hearing); *Swisher*, 438 U.S. at 206 (injunction against juvenile court proceedings alleged to violate the Double Jeopardy Clause); *Riverside*, 500 U.S. at 47 (prompt probable cause hearings).

[4] The willingness of the four *Geraghty* dissenters to join the mootness analysis in *Sosna* and *Gerstein* underscores the implausibility of reading those cases as constructing a comprehensive exception to mootness for collective actions.

That analysis resolves any case in which a plaintiff seeks purely retrospective relief.[5] Because such a case can become moot only upon the defendants' willingness to provide the sought-after relief, a decision not to adjudicate such cases in federal court would never deprive a plaintiff, or any class of plaintiffs, of an opportunity for complete relief. Accordingly, this case does not present the exceptional circumstances that justify application of the *Sosna* doctrine. *See* SG Br. 30-32 (advancing a similar argument).

C. The FLSA Does Not Compel Continued Litigation After an Offer of Complete Relief.

Respondent also argues (Resp. Br. 21-30) that dismissal would "thwart Congress's affirmative choice in the FLSA to enable collective actions." Respondent ignores the problem that, whatever Congress's intention, the system for litigation established by the FLSA is necessarily confined within the bounds set by Article III. It is far too late in the day to suggest that Congress has an unconstrained power to require the federal courts to adjudicate matters outside the judicial Power. *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571-78 (1992); *id.* at 580-81 (Kennedy, J., concurring).

In truth, though, this case presents no such constitutional question. Respondent's argument for a

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[5] Respondent's inability to seek injunctive or declaratory relief reflects Congress's determination in Section 216(b) that those forms of prospective relief are not available for cases (like this one) alleging violations of Sections 206 and 207 of the FLSA.

special FLSA mootness exception rests on the unsupportable premise that Congress intended to create a special procedure for collective adjudication immune from the ordinary constraints of the judicial Power. Although respondent dramatizes the importance of collective relief to effective enforcement of the FLSA, the relevant historical facts are undisputed. First, the FLSA before 1947 permitted "representative" actions.[6] Second, Congress in 1947 "respond[ed] to excessive litigation spawned by plaintiffs lacking a personal interest in the outcome" by truncating the availability of representative actions.[7] Third, the congressional response, reflected in the existing text of Section 216(b), permits an action on behalf of the identified plaintiff "and other employees similarly situated," subject to the constraint that individual claimants can become parties to cases under Section 216(b) only by filing written consent with the court.

Nothing in that history suggests a special concern that collective process be *more* readily inclusive in this context than in any of the myriad contexts in which collective relief is available under Federal Rule of Civil Procedure 23. Indeed, the explicit statement in Section 216(b) that unjoined hypothetical claimants are not parties until they affirmatively opt in to the litigation documents a patent intention to make the collective process *less* readily inclusive than the customary process available under Rule 23. Pet. Br. 26-28. Because Section 216(b) speaks directly to the

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[6] Fair Labor Standards Act of 1938, ch. 676, § 16(b), 52 Stat. 1060, 1069; *see Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989); Chamber of Commerce Amicus Br. 12-13.

[7] *Hoffman-La Roche Inc.*, 493 U.S. at 173 (discussing the Portal-to-Portal Act of 1947, ch. 52, §§ 5(a), 6, 7, 61 Stat. 84, 87-88); *see* Chamber of Commerce Amicus Br. 13.

aspect of collectivity that is relevant here – the interests of hypothetical unjoined claimants – it strongly undermines any suggestion that Congress implicitly intended to give the interests of those claimants more relevance here than they would have in litigation under Rule 23.[8] The Court has no reason to consider the possibility that Congress transgressed constitutional boundaries in compelling adjudication of a plaintiff-less case such as this one.[9]

Finally, we feel compelled to respond to the pervasively hyperbolic suggestion (*e.g.*, Resp. Br. 26-30) that dismissal of this case would deal a fatal blow either to collective actions under the FLSA or to class actions more broadly. The willingness of defendants to provide comprehensively complete offers of relief is likely limited to a tightly confined subset of cases: those in which the plaintiffs seek no equitable relief; in which the plaintiffs' entitlement to damages is purely retrospective; in which the amount of damages can be indisputably calculated as a relatively small amount; and in which the number of expected plaintiffs is relatively small. In cases that lack any of those characteristics, a rational defendant would

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[8] Indeed, the statutory proviso provides an even stronger basis for holding that the loss of respondent's personal stake made this case moot than the arguments discussed above about the traditional context of litigation under Rule 23. *See* Pet. Br. 26-29.

[9] For the same reason, there is no merit to respondent's contention (Resp. Br. 30-32) that her allegation in the complaint that the case is brought on behalf of others "similarly situated" controls the question whether those hypothetical unjoined claimants have an interest in the case. Because Section 216(b) states that those individuals are not parties to the case, no allegation in respondent's complaint can oblige a court to treat them as parties.

have nothing to gain by providing complete relief on a case-by-case basis. *See* ACA Int'l Amicus Br. 7-13.

More generally, the continuing viability of collective process in the face of the common-sense approach we articulate is evident from the continuing frequency of collective litigation even in circuits like the Seventh Circuit that have long adhered to the rule we advocate here. It well might be that the position we advocate will lead to speedier relief in isolated or small-dollar cases that do not warrant the costs of protracted litigation, but we see nothing offensive to congressional intent or sensible policy in a world in which the price of resolution is a prompt offer of indisputably complete relief.

Because respondent offers no substantial argument to support a special exception to mootness doctrine for cases arising under the FLSA, the Court has no occasion to consider whether the Constitution would tolerate such an exception.

D. Respondent Correctly Conceded That She Has No Continuing Personal Stake in the Dispute with Petitioners.

Finally, respondent argues (Resp. Br. 44-47) that she has a continuing personal interest in the litigation, which brings the case under the rule of *Roper*.[10] Two problems confound that argument.

1. The most obvious is that respondent has conceded the adequacy of the offer at all stages of the litigation up to this point. Starting with respondent's brief opposing petitioners' motion to dismiss the case

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[10] The Solicitor General presents a similar argument. SG Br. 26-27.

in the district court, respondent acknowledged that "[a]n offer of complete relief will generally moot the plaintiffs [*sic*] claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation." J.A. 93. Respondent (at Resp. Br. 15 n.2) characterizes this as only a "general" statement rather than an overt concession. But respondent agreed that an offer such as this one "generally" would moot the case. Respondent offered no description of circumstances in which such an offer would not vitiate the interest of its recipient, and gave the district court no reason to doubt mootness except for the single reason adjudicated below: that the interests of hypothetical unjoined claimants should "relate back" to the filing of the complaint and thus prevent immediate dismissal. *See* J.A. 93-110 (respondent's constitutional argument to the district court).

Most importantly, it is apparent that the district court understood this as a concession. That court explained in its order: "[Respondent] does not take issue with [petitioner]s' assertion that the damages offered exceed any amount of unpaid wages sought; thus, the only legal question the Court must address is whether the rejected Rule 68 offer renders this case moot." Pet. App. 34. If respondent had any concerns about the adequacy of the offer, surely it should have raised those concerns two years ago when the case was in the district court.

The record in the court of appeals is similar. Respondent conceded that "[a]n offer of complete relief will generally moot the plaintiffs [*sic*] claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation." J.A. 193. Respondent again did not suggest that the offer afforded relief less than "complete" in any way, but rather relied

entirely on the doctrine of "relation back." J.A. 194-208 (subpart II(A) and Parts III-IV of respondent's brief). Like the district court, the court of appeals understood that "[respondent] did not dispute the adequacy of [petitioner]s' offer." Pet. App. 4.

Finally, respondent conceded the adequacy of the offer in her brief in opposition to the petition, which phrased the question presented by the case as involving an offer of judgment that "provided complete relief on [respondent's] individual claims," Br. in Opp. i. As in her filings in the courts below, respondent did not suggest any doubts about the adequacy of the offer made to her more than two years earlier.

2. Nor does respondent suggest any colorable reason for doubting the adequacy of the offer. First, respondent argues (Resp. Br. 44-46) that petitioners did not offer to compensate her for her costs and attorney's fees, pointing out that the letter transmitting the offer contemplated the payment of attorney's fees in an amount determined by the court.[11] The language of the offer belies that argument; it contemplated compensation for all "reasonable attorneys' fees, costs, and expenses to which [respondent] is entitled by law, as the Court may determine." J.A. 77. To be sure, the offer did not specify the precise dollar

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[11] Respondent claims (Resp. Br. 45 n.10) that it is "unclear how Petitioners calculated" the amount due to respondent. The calculations, set forth in considerable detail at J.A. 78-86, were designed to pay respondent her regular hourly or overtime rate (as applicable) for all of the break time charged during her entire period of employment, as well as all of her attorney's fees, costs, and other expenses. Again, it is far too late for respondent to characterize that offer as "surely inadequate" (Resp. Br. 45 n.10).

amount of costs and fees to be awarded, but that is not the relevant question. The relevant question is whether the offer, if accepted, would have provided respondent an amount no less than the greatest amount she could have recovered through pursuit of the litigation. Because the offer promised all of the costs and fees that a court would provide her, it met that standard.[12]

There is for the same reason no substance to respondent's contention (Resp. Br. 46-47) that the possibility of some future incentive award gives her a continuing economic interest in the dispute. This contention is misleading; as respondent's counsel surely know, the FLSA does not authorize incentive awards. The relevant portion of Section 216(b) specifies the available relief as "a reasonable attorney's fee

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[12] The generous rules for fees and costs under the FLSA make it likely that the offer would have resulted in payment of all of the expenses respondent had incurred in the litigation. *See generally* Chamber of Commerce Amicus Br. 7-8. Lower courts repeatedly have held that "costs" recoverable under the FLSA go well beyond the standard contemplated by Fed. R. Civ. P. 54(d) and 28 U.S.C. 1920. *E.g.*, *Calderon v. Witvoet*, 112 F.3d 275 (CA7 1997) (FLSA contemplates recovery of all expenses that normally would appear on an attorney's bill, even if not recoverable under Section 1920); *Herold v. Hajoca Corp.*, 864 F.2d 317, 323 (CA4 1988) (FLSA costs are broader than costs under Rule 54 of Section 1920); *Colunga v. Young*, 722 F. Supp. 1479, 1488 (W.D. Mich. 1989) (explaining that the "remedial and thus more broadly interpreted cost-shifting aspect" of FLSA permits recovery of travel and telephone costs not reimbursable under Rule 54 of Section 1920), *aff'd*, 914 F.2d 255 (CA6 1990). We do not suggest that it is *impossible* that respondent might have incurred some minor unidentified expense that would not be recoverable under the FLSA. We do think, however, that it was incumbent on her, if she harbored such a concern, to present it two years ago when the case was in the district court.

* * * and costs of the action." Respondent cites no case reading that provision to permit a court to impose an incentive award.[13] Again, because the relevant baseline for determining the adequacy of the offer is the relief that a court could order, the absence of an incentive award from petitioners' offer is irrelevant.

Because petitioners offered respondent more than she reasonably could have expected to recover even if she had completely prevailed in the litigation, the claim that she retained a continuing economic interest in the litigation because of inadequacies in the offer would be groundless even if she had not conceded the issue in the courts below and in this Court.

II. Respondent's Refusal to Accept Petitioners' Offer of Complete Relief Affords No Basis for Affirming the Decision of the Court of Appeals.

Respondent's presentation focuses on a separate question, not previously disputed in this litigation: whether her individual interest was vitiated when she failed to accept petitioners' offer of complete relief. Respondent presents two related arguments on that question. First, she suggests that because she did not accept petitioners' offer, the offer had no effect on her stake in continuing the litigation. Resp. Br. 12-16; *see* SG Br. 10-15 (parallel argument that the trial court should have responded to the unac-

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[13] The only case to which she refers involves a voluntary settlement in which a defendant agreed to pay an incentive award. *See Espenscheid v. DirectSAT USA, LLC*, 688 F.3d 872, 877 (CA7 2012). That decision sheds no light on the type of judgment a court might enter in a contested proceeding under the FLSA.

cepted offer by entering judgment in favor of respondent). Second, she suggests that Federal Rule of Civil Procedure 68 does not apply at all to FLSA cases. Resp. Br. 16-19; *see* SG Br. 15-18 (parallel argument that courts in FLSA cases should rule on the propriety of collective process before processing unaccepted Rule 68 offers). Those arguments are neither properly presented nor meritorious.

A. The Question Whether an Offer of Complete Relief Vitiates the Plaintiff's Stake in a "Case" Does Not Warrant This Court's Attention.

1. As the Court reiterated just last year, arguments not called to the attention of the Court in the opposition to the petition for certiorari are "normally considered waived" under this Court's Rule 15.2. *Nevada Commission on Ethics v. Carrigan*, 131 S. Ct. 2343, 2351 (2011); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2857 (2011). The brief in opposition did not suggest that respondent would interpose this defense of the judgment below. Rather, the sole suggested justification for the judgment below was the "relation back" doctrine discussed above. *See* Br. in Opp. 6-15.

2. Moreover, respondent conceded that point in the courts below. Both courts included in their opinions a close paraphrase of her concession that an "offer of complete relief generally will moot the plaintiffs [*sic*] claim." *See* Pet. App. 14 (court of appeals), 35 (district court).[14] This Court frequently has em-

[14] Respondent did argue in the district court and the court of appeals that the trial court should engage in fairness review before dealing with the Rule 68 offer. J.A. 110-112 (district court), 208-11 (court of appeals). That is quite different from

phasized the importance of "lower court opinions to guide our analysis," underscoring this Court's role as "a court of final review and not first view," *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) (quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam)); *see Baldwin v. Reese*, 541 U.S. 27, 34 (2004). Because respondent withheld this argument from the courts below, the case comes to this Court with neither a factual record to illuminate the relevant practical considerations nor opinions providing a first look at the problem.

Even if respondent had raised the question in her brief in opposition, we would see little justification for plenary consideration. To be sure, there is some tension in the lower courts as to whether the appropriate response to an unaccepted offer of complete relief is to dismiss the case entirely (the approach of the trial court) or instead to enter judgment in favor of the plaintiff in accordance with the offer. *Compare, e.g., Weiss v. Regal Collections*, 385 F.3d 337, 340 (CA3 2004) (followed by the court below), *with, e.g., McCauley v. Trans Union, L.L.C.*, 402 F.3d 340, 342 (CA2 2005) ("better" approach is to enter a default judgment in favor of the plaintiff).

But that tension is limited to a procedural technicality. It seems unlikely that any defendant that made a Rule 68 offer including complete relief would object to entry of judgment in favor of the plaintiff in accordance with the offer and litigate the issue to this Court. For example, our clients have advised us that they readily would have consented to such a

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the arguments that she now presents – that an unaccepted offer has no effect at all and that Rule 68 does not apply in FLSA cases.

judgment; indeed, they would consent to such a judgment at this time, so long as it disposed of the entire litigation. The Court's normal reliance on adversary presentation to support its deliberations strongly suggests waiting for a case in which opposing parties disagree.

It makes no sense for this Court to reverse the trial court for its failure to take a step that respondent has never requested. Moreover, pace the Solicitor General (SG Br. 18-20), that problem has no logical relationship to the question presented: if the trial court had issued a judgment in favor of respondent, the question immediately would have arisen whether she could rely on the interests of others to justify continued litigation.

Related consideration of that issue would encourage crafty attorneys to sandbag district courts – using challenges to a trial court's procedures like hole cards to be concealed through years of litigation and multiple stages of review. At the same time, this Court's willingness to overlook such behavior would evince an unwonted disrespect for the district court's efforts to resolve the questions presented to it. Neither respondent nor the Solicitor General suggests any substantial reason for departing from customary process in this instance.[15]

3. For similar reasons, we see no basis for the suggestion of the Solicitor General (SG Br. 19-20) that the Court should dismiss the writ of certiorari as

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[15] Respondent overreaches when she contends (Resp. Br. 15 n.2) that the issues are "jurisdictional." The Court's jurisdiction over this matter under 28 U.S.C. 1254(1) is unquestioned, as was that of the courts below under 28 U.S.C. 1291 and 28 U.S.C. 1331.

improvidently granted. There is no doubt that the question on which the Court granted review was presented and decided below. Nor is this a case in which the record suggests any uncertainty about the factual predicate for that question. At worst, this is a case in which respondent and the Solicitor General have responded to this Court's decision to grant review by manufacturing a plethora of new arguments – most of them never previously presented to or considered by any appellate court – that respondent's counsel might have chosen to present to the court below.

The new arguments change nothing about the landscape described in the petition: a pervasive confusion in the courts of appeals about the application of this Court's existing mootness cases to litigation seeking collective relief. The case before the Court provides an excellent opportunity for considering the problem; litigation of this matter has proceeded for more than two years since the sole plaintiff lost any continuing personal stake. The opinion of the court of appeals is typical of the analytical errors of the lower courts. Reversal of the decision below will guide the lower courts by finally terminating this litigation, while dismissal will allow this litigation to continue and the confusion of the lower courts to persist. The most sensible approach is to proceed to decision at this time.

B. An Offer of Complete Relief Vitiates the Plaintiff's Stake in the "Case."

Respondent's new contentions are meritless. Respondent does not accept the Solicitor General's view (SG Br. 13-15) that the trial court should have entered judgment in favor of the plaintiff. Rather, respondent contends (Resp. Br. 12-16) that because

an unaccepted offer is withdrawn it has no effect on justiciability.[16] The implications of respondent's understanding of Rule 68 are breathtaking: by simply filing suit and alleging a controversy, a single plaintiff could force a defendant to remain in litigation – class-sized litigation – indefinitely. That result would follow even if, as here, the record conclusively demonstrated the conceded absence of any actual controversy between the parties.

Respondent fails to identify anything that might remain for adjudication after the defendants have formally expressed their willingness to provide complete relief. The most direct approach would be to hold that there is no "Case" under Article III when the defendant chooses not to dispute the relief sought in the plaintiff's complaint.[17] In Judge Easterbrook's terms, "once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate." *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (CA7 1991); *see* DRI Amicus Br. 11.

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[16] Although we discuss above the tension among the courts of appeals about how to terminate the case after an unaccepted offer of complete relief, no court has adopted respondent's view that the district court must ignore the offer entirely.

[17] *Compare Vitek v. Jones*, 445 U.S. 480, 486-87 (1980) (suggesting that voluntary shift of conduct by defendant moots case if it removes "the reality of the controversy"); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) ("Our decisions have required that the dispute be definite and concrete, touching the legal relations of parties having adverse legal interests * * * ." (citations and internal quotation marks omitted)); *Alvarez v. Smith*, 130 S. Ct. 576, 580 (2009) (holding dispute moot where parties "continue to dispute the lawfulness of the [defendant's] procedures [but] that dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights").

It is true, as respondent's counsel note (Resp. Br. 15), that respondent has not received a penny of the amount offered by petitioners. That is not, however, a problem to be laid at petitioners' door. Rather, it reflects a strategic choice of respondent, presumably reflecting the advice of her attorneys that she should not accept complete relief. Addressing a similar point, Judge Posner remarked:

> You cannot persist in suing after you've won. [The plaintiff's counsel] may have thought that he had something to gain by pressing on—additional attorney's fees. But if that is what he thought, he was mistaken. Once a party has won his suit and obtained the attorney's fees that were reasonably expended on winning, additional attorney's fees would not be *reasonably* incurred. So, by spurning the defendant's offer, [the plaintiff's counsel] shot both himself and his client in the foot.

Greisz v. Household Bank (Ill.), N.A., 176 F.3d 1012, 1015 (CA7 1999) (emphasis in original).

In sum, the Court need not worry that it overlooks any weighty constitutional question by proceeding directly to the question on which it granted review.

C. Rule 68 Applies to Cases Under the FLSA.

Respondent's related contention that Rule 68 is wholly inapplicable to cases brought under the FLSA (Resp. Br. 16-19) is even less persuasive. As with her argument that the FLSA creates an exception to standard mootness doctrine (addressed in Point I(C), *supra*), respondent identifies no language in the FLSA suggesting that Rule 68 should not apply.

Rather, respondent argues that trial courts cannot approve settlements in FLSA cases without first engaging in a comprehensive review of the fairness of the settlement, and reasons from that premise to the conclusion that the need for fairness review makes it inappropriate to allow an offer of complete relief to terminate a plaintiff's claim. But whatever the proper scope of fairness review,[18] its application to this factual setting would be bizarre; although respondent's presentation obscures the point, her argument necessarily implies the view that a private plaintiff does not have the authority to accept complete satisfaction of its claims. That the possible joinder of other claimants should preclude the sole existing party from accepting complete relief seems odd at best. It is, moreover, in direct tension with the provision in Section 216(b) that those hypothetical unjoined claimants are not parties until and unless they in fact join the litigation.

In any event, even under respondent's conception of the statute, the requirement of fairness review would have no logical relation to the appropriate treatment of an offer of complete relief. If the offer in fact provides complete relief, a question the trial court might adjudicate in cases of dispute, there would be no basis for any conclusion that the offer was unfair to the plaintiff. In this case, for example, given the evident generosity of the offer, coupled with respondent's concession to the trial court that the

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[18] The far-reaching implications of the arguments of respondent and the Solicitor General about fairness review under the FLSA make those questions particularly ill-suited to disposition by this Court in a case of first instance, without an opportunity for factual development, briefing, or development by the courts below.

offer provided complete relief, on what basis could the court have justified refusing to permit acceptance of the offer?

In sum, whatever scrutiny might be appropriate for a case in which a plaintiff privately compromises her claims, the district court's power or obligation to review that settlement has no application to a case in which defendants offer complete relief with an offer of public judgment. Accordingly, even if the Court were inclined to accept respondent's understanding of the requirement of fairness review, it would provide no support for the decision of the court of appeals.[19]

CONCLUSION

The multifarious new arguments of respondent and the Solicitor General should not obscure the importance of the question the Court agreed to review here. The decision of the court of appeals

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[19] The Solicitor General presents a parallel though distinct argument (SG 15-18), that a court cannot enter judgment on a Rule 68 offer without first proceeding through the certification process. As the Solicitor General acknowledges (SG Br. 18-25), respondent has never presented that argument and no court previously has considered it. Accordingly, like respondent's newly discovered justifications for the decision below, it is not properly before the Court.

Moreover, the argument is meritless. The premise of the argument is that the FLSA reflects a special congressional intent that the interests of absent parties, those hypothetical and not yet located individuals alleged to be "similarly situated" to respondent, should be even more important than they are in the traditional Rule 23 context. But Congress's explicit declaration that those individuals are not "parties" until they affirmatively opt in to the litigation cannot be reconciled with the view that those interests are more important here than they would be in litigation under Rule 23. *See* subpoint I(C), *supra*.

mandated continued litigation of this case notwithstanding the absence of any plaintiff with a personal stake in the litigation. Only this Court can remind the courts of appeals of the inconsistency of that process with the Constitution's limitation of the judicial Power to "Cases."

The decision of the court of appeals should be reversed.

Respectfully submitted,

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November 2012

AMICUS CURIAE BRIEF

No. 11-1059

In the Supreme Court of the United States

GENESIS HEALTHCARE CORPORATION, ET AL.,
PETITIONERS

v.

LAURA SYMCZYK

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTION PRESENTED

Whether an action brought as a collective action under 29 U.S.C. 216(b) becomes moot when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff's individual damage claims.

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In the Supreme Court of the United States

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v.

LAURA SYMCZYK

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF THE UNITED STATES

This case presents the question whether a defendant unilaterally moots a collective action brought by a plaintiff on behalf of herself and other similarly situated employees under 29 U.S.C. 216(b) for alleged violations of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, if it offers, before another plaintiff joins the action, to consent to a judgment that—if entered by the court—would fully satisfy the named plaintiff's individual damage claim. The United States has a significant interest in the resolution of that question. The Secretary of Labor is responsible for administering and enforcing the FLSA by, *inter alia*, bringing civil enforcement actions on behalf of employees, 29 U.S.C. 216(c), 217, which private enforcement actions supplement. The

Equal Employment Opportunity Commission (EEOC) is responsible for enforcing the Equal Pay Act of 1963 (EPA), 29 U.S.C. 206(d), and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* Both statutes are enforced in part through private actions that may proceed as collective actions under Section 216(b). 29 U.S.C. 216(b), 626(b). The United States is also the Nation's largest employer and is a potential defendant in actions governed by Section 216(b).

STATEMENT

1. Congress enacted the FLSA to protect workers, particularly non-unionized workers, by establishing federal minimum-wage, maximum-hour, and overtime guarantees that cannot be modified through contract. See *Brooklyn Sav. Bank* v. *O'Neil*, 324 U.S. 697, 706-707 & n.18 (1945). Section 16(b) of the FLSA, 29 U.S.C. 216(b) —referred to here as Section 216(b)—establishes liability for FLSA violations and gives employees a private right of "action to recover [that] liability." *Ibid.*

Section 216(b) gives an employee a statutory "right * * * to bring an action" on his own behalf and "on behalf of any [similarly situated] employee." 29 U.S.C. 216(b). More specifically, Section 216(b) provides that "any one or more employees" may "maintain[] against any employer" an action to recover FLSA liability "for and in behalf of himself or themselves and any other employees similarly situated." *Ibid.* An action brought on behalf of other similarly situated employees is known as a "collective action." See *Hoffman-La Roche, Inc.* v. *Sperling*, 493 U.S. 165, 169-170 (1989).

Unlike a "class action" certified under Rule 23, which binds either all members of the certified class or those who do not opt out, *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2558 & n.11 (2011), a collective action binds

only those employees who affirmatively opt in as plaintiffs. Section 216(b) specifies that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. 216(b). The action is "considered to be commenced" for that employee for statute-of-limitations purposes on the "date on which [his] written consent is filed in the court." 29 U.S.C. 256(b); see 29 U.S.C. 255(a).

"Section 216(b)'s affirmative permission for employees to proceed on behalf of those similarly situated * * * grant[s] the [trial] court the requisite procedural authority to manage the process of joining multiple parties." *Hoffman-La Roche*, 493 U.S. at 170. Accordingly, "once an [FLSA] action is filed, the court has a managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way." *Id.* at 170-171. The court may supervise "discovery of the names and addresses" of similarly situated employees and exercise its discretion "to implement 29 U.S.C. § 216(b) * * * by facilitating notice to potential plaintiffs" and "setting cutoff dates" for opt-in plaintiffs. *Id.* at 169-170, 172.

Courts and commentators have borrowed class-action terminology to describe the process of joining co-plaintiffs under Section 216(b). *Kelley* v. *Alamo*, 964 F.2d 747, 748 n.1 (8th Cir. 1992). Federal courts typically follow a two-step joinder process, which is commonly labeled "certification." See *Comer* v. *Wal-Mart Stores, Inc.*, 454 F.3d 544, 546-547 (6th Cir. 2006); Pet. App. 8-12 & n.5. At step one, if the named plaintiff makes a sufficient preliminary showing that other employees are "similarly situated," the court may exercise its discre-

tion to "conditionally certify" the collective action, *i.e.*, allow discovery of the names and addresses of potential opt-in plaintiffs and mailing of court-approved notice. *Id.* at 8-9, 12-13. At step two, after opt-in consents have been filed and further discovery has been completed, the court determines whether each opt-in plaintiff is "similarly situated" to the named plaintiff. *Id.* at 10-11; see, *e.g.*, *Morgan* v. *Family Dollar Stores, Inc.*, 551 F.3d 1233, 1260-1262 (11th Cir. 2008), cert. denied, 130 S. Ct. 59 (2009); *Comer*, 454 F.3d at 546-547.

2. a. Respondent was employed in 2007 as a registered nurse at a facility owned by petitioners. J.A. 22-23, 118-119. Respondent alleges that petitioners unlawfully and willfully denied minimum and overtime wages to respondent and similarly situated employees, J.A. 29-30, 126-127, by automatically deducting 30 minutes per shift for meal breaks of non-FLSA-exempt employees, even when they performed compensable work during the nominal breaks, J.A. 23-24, 119-120.

In December 2009, respondent filed a complaint on behalf of herself and all "similarly situated" persons, *i.e.*, persons petitioners employed in the past three years whose pay was subject to an automatic-meal-break deduction even when they performed compensable work. J.A. 21, 26-27, 43; see J.A. 115-116, 122-123.

On February 18, 2010, petitioners simultaneously answered the complaint (J.A. 44-53) and served upon respondent, pursuant to Rule 68, an offer of judgment (J.A. 80-81). Rule 68 governs a particular type of settlement offer made by defendants that, in certain circumstances, has particular legal consequences. *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 350, 354 n.13 (1981). A valid Rule 68 settlement offer must, *inter alia*, offer to allow entry of judgment for the plaintiff on

specified terms, Fed. R. Civ. P. 68(a), and may "not implicitly or explicitly provide that the judgment *not* include costs." *Marek* v. *Chesny*, 473 U.S. 1, 6 (1985). By operation of Rule 68(a), a valid offer will necessarily consent to a judgment including accrued "costs," *ibid.*, which includes attorney's fees if the underlying statute treats them as a component of "costs." *Id.* at 7-9. If the plaintiff accepts a valid Rule 68 offer within 14 days of its service and a party "file[s] the offer and notice of acceptance" with proof of service, the district court clerk must enter judgment accordingly. Fed. R. Civ. P. 68(a). If the plaintiff does not accept the offer and later prevails but obtains a judgment no more favorable than the unaccepted offer, Rule 68 specifies that the prevailing plaintiff must pay the "costs" incurred after the offer was made, including any attorney's fees properly labeled as "costs." Fed. R. Civ. P. 68(d); see *Marek*, 473 U.S. at 10-11. Rule 68 further provides that "[a]n unaccepted offer is considered withdrawn" and that "[e]vidence of an unaccepted offer is not admissible except in a proceeding to determine costs." Fed. R. Civ. P. 68(b).

Petitioner's Rule 68 offer would have allowed the entry of a $7500 consent judgment for respondent, exclusive of attorney's fees and costs. J.A. 80-81. Consistent with Section 216(b)'s direction that the court in an FLSA "action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action," 29 U.S.C. 216(b), petitioners stated in a cover letter (J.A. 77-79) that their offer included "such reasonable attorneys' fees, costs, and expenses to which [respondent] is entitled by law." J.A. 77; see J.A. 79. By its terms, the offer was to "remain open until it expires by operation of law, unless otherwise withdrawn by [pe-

titioners]." J.A. 81. Petitioners' letter added that if respondent did not timely accept their Rule 68 offer, the offer "shall be deemed withdrawn." J.A. 79.

Respondent did not timely respond (by March 4, 2010) to petitioner's settlement offer. Pet. App. 4.

b. On March 10, 2010, the district court (which was unaware of the settlement offer, Pet. App. 43) issued an order allowing 90 days for discovery, after which respondent could move for "conditional certification," J.A. 62. Within two weeks, petitioners filed a Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction. J.A. 64-86. Petitioners argued that they had offered respondent complete relief on her individual damages claim, fees, and costs; that respondent "effectively reject[ed] the Offer" by failing to respond; and that the entire collective action had become moot because, having rejected the offer, respondent "no longer has a personal stake or legally cognizable interest in the outcome of this action." J.A. 65-67; see J.A. 70-72.

c. The district court did not enter judgment for respondent on her individual damages claim as petitioners had offered. The court instead issued an opinion (Pet. App. 30-44) "tentatively conclud[ing]" that petitioners' "Rule 68 offer of judgment moots this collective action." *Id.* at 43. The court's final order stated that "[respondent's] FLSA claim is dismissed with prejudice for the reasons stated in [the court's prior opinion]," and directed that the case be closed. *Id.* at 45-46.

Respondent appealed the order "dismissing Plaintiff's [respondent's] FLSA claim and directing the Clerk to close th[e] case." Dist. Ct. Doc. 38 (notice of appeal).

4. The court of appeals reversed the district court's judgment and remanded. Pet. App. 1-29. The court stated that, under circuit precedent, an unaccepted "of-

fer of complete relief will generally moot [a] plaintiff's claim," because the plaintiff will "retain[] no personal interest in the outcome of the litigation" once judgment is offered on "all the relief [the] plaintiff could potentially recover at trial." *Id.* at 14 (quoting *Weiss* v. *Regal Collections*, 385 F.3d 337, 340 (3d Cir. 2004)). However, the court reasoned that such "conventional mootness principles" do not "fit neatly" into the collective-action context, where the "named plaintiff purports to represent an interest that extends beyond his own." *Ibid.* (citation omitted). The court explained that Section 216(b) gives the named plaintiff the "right to act on behalf of similarly situated co-workers" and thus confers "a personal stake in representing the interests of others" if a co-plaintiff opts into the action. *Id.* at 22 n.11, 25. The court accordingly concluded that if another employee opts into the action, petitioners' offer of judgment addressing only respondent's individual claims "would no longer fully satisfy" all the claims in the action, and "the proffered rationale behind dismissing the complaint [as moot] would no longer be applicable." *Id.* at 29.

The court of appeals emphasized the potential for "Rule 68 [to] be manipulated" by defendants in collective actions. Pet. App. 15, 21-22, 27. The court explained that petitioners' position would permit the "undesirable strategic use of Rule 68" by defendants, who could terminate collective actions by "picking off" representative plaintiffs before other employees could opt in. *Id.* at 22, 24 (citation omitted). That result, the court concluded, would be inconsistent with the intended operation of Section 216(b) collective actions, *id.* at 25-26, 28, and would render a named plaintiff's claims "'acutely susceptible to mootness' while the action was in its early stages," before the trial court had determined whether

"to facilitate notice to prospective plaintiffs," *id.* at 26 (citation omitted). The court therefore applied a "relation back doctrine" to allow a "collective action [to] play[] out according to the directives of [Section] 216(b)" and to "prevent[] defendants from using Rule 68 to 'undercut the viability' of [such an action]." *Id.* at 26, 28.

The court of appeals directed that, on remand, if respondent moves for "conditional certification" and the district court concludes that that motion was "made without undue delay," then the motion will "relate * * * back to * * * the date on which [respondent] filed her initial complaint." Pet. App. 28-29. The court explained that, if "at least one other similarly situated employee opts in," then respondent's complaint should not be dismissed as moot because the "Rule 68 offer of judgment would no longer fully satisfy the claims of everyone in the collective action." *Id.* at 29. But if respondent's conditional-certification motion is held untimely or no one else opts in, petitioners' "Rule 68 offer to [respondent]—in full satisfaction of her individual claim—would moot the action." *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals correctly reversed the district court's judgment but its rationale was flawed.

I. Contrary to the court of appeals' view, a defendant's Rule 68 offer to accept an adverse judgment does not moot a plaintiff's claim, even if the judgment, if entered by the court, would have fully satisfied the claim. Such an offer imposes no obligation until it is accepted. And if a plaintiff does not agree to settle her damages claim, it remains live, because a federal court can continue to grant effectual relief.

A district court has discretion to enter judgment for the plaintiff when a defendant is willing to accept an ad-

verse judgment, even if the plaintiff objects to a judgment in her favor. That is the proper course when further litigation would serve no significant purpose. But in the context of a collective action, Section 216(b) limits the court's discretion to enter judgment for the named plaintiff over her objection. In light of the important statutory function served by collective actions, sound judicial administration requires that the collective-action process proceed unaffected by a defendant's attempt to "buy off" an unwilling named plaintiff.

The question whether an unaccepted settlement offer moots a named plaintiff's individual claim on the merits is within the scope of the question presented, is a necessary predicate to the intelligent resolution of that question, and has led to divergent results in the courts of appeals. This Court should therefore decide that question and affirm the judgment of the court of appeals on the ground that respondent's personal FLSA damages claim is not moot. That antecedent issue is so central to the proper Article III analysis that, if this Court were to decide not to examine it, the United States suggests that the Court consider dismissing the writ as improvidently granted.

II. If the Court disagrees with our submission and concludes that petitioners' unaccepted settlement offer moots respondent's personal claim, the collective action here may also be moot. Respondent, however, may have a sufficient economic interest in collective-action certification to warrant her ongoing role in the certification process. That question could be considered further by the district court on remand.

ARGUMENT

I. THIS CASE IS NOT MOOT BECAUSE RESPONDENT'S INDIVIDUAL FLSA CLAIM IS NOT MOOT

The court of appeals erroneously concluded that a plaintiff's claim generally is rendered moot when a defendant proffers a Rule 68 settlement offer to allow a judgment to be entered against the defendant that—*if* accepted and entered by a court—would fully satisfy the claim. Where, as here, the plaintiff declines to accept such an offer, the offer is a nullity and has no effect on the claim that might have been, but was not, resolved by the proffered judgment. Neither respondent's individual FLSA claim, nor this case more generally, is moot.

A. An Unaccepted Offer Of Judgment Does Not Moot A Plaintiff's Claim

1. To state an Article III "case" or "controversy," a plaintiff must establish that she possessed Article III standing when "the action commence[d]." *Friends of the Earth, Inc.* v. *Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000) (*Laidlaw*); see *Davis* v. *FEC*, 554 U.S. 724, 732-733 (2008). Respondent unquestionably had Article III standing to seek damages for petitioners' alleged violation of her FLSA rights. Jurisdiction is therefore presumed to continue, "absent further information." *Cardinal Chem. Co.* v. *Morton Int'l, Inc.*, 508 U.S. 83, 98 (1993).

A party asserting that a once-live case or controversy has become moot "bears the burden of coming forward with the subsequent events that have produced that alleged result." *Cardinal Chem. Co.*, 508 U.S. at 98. "A case becomes moot only when it is impossible for a court to grant 'any effectual relief whatever to the prevailing party.'" *Knox* v. *Service Employees Int'l Union*, 132

S. Ct. 2277, 2287 (2012) (citation omitted). Judicial relief will not be effectual, for instance, if "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 396 (1980) (citation omitted).

A defendant's unaccepted offer to settle a plaintiff's claim does not render the claim moot, because it does not result in an actual settlement or prevent the court from granting the plaintiff's requested relief. It is "well settled" that "an offer * * * imposes no obligation until it is accepted" and that the offeree's rejection of an offer "leaves the matter as if no offer had ever been made." *Minneapolis & St. Louis Ry.* v. *Columbus Rolling Mill*, 119 U.S. 149, 151 (1886); see, *e.g.*, *Eliason* v. *Henshaw*, 17 U.S. (4 Wheat.) 225, 228 (1819). Rule 68 does not alter that basic background principle. To the contrary, it specifies that "[a]n unaccepted offer is considered withdrawn." Fed. R. Civ. P. 68(b). A defendant's Rule 68 offer to allow entry of an adverse judgment thus has no effect on the plaintiff's claim unless and until the plaintiff accepts it. Rule 68 directs that the clerk "must then enter judgment" for the plaintiff only if the offer *and* the "notice of acceptance" have been filed. Fed. R. Civ. P. 68(a).

The district court's failure to enter the offered judgment for respondent confirms that petitioners' mere offer of settlement, which respondent never accepted and petitioners withdrew, did not extinguish respondent's individual FLSA claim. Respondent never accepted any payment to settle her personal claim, and the district court entered no judgment for respondent satisfying that claim in full. In short, respondent's FLSA claim remains unsatisfied. It is thus difficult to understand

how that unsatisfied damages claim could be deemed "moot" in an Article III sense simply because she did not respond to a settlement offer within 14 days.

2. Several courts of appeals, including the Third Circuit, have nonetheless concluded that a settlement offer that would fully satisfy a plaintiff's claim will render the claim moot, at least when it is the only claim advanced in the action. See, *e.g.*, *Weiss* v. *Regal Collections*, 385 F.3d 337, 340 (3d Cir. 2004) (citing *Rand* v. *Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991)); *Greisz* v. *Household Bank (Ill.), N.A.*, 176 F.3d 1012, 1015 (7th Cir. 1999) (Posner, C.J.); *Zimmerman* v. *Bell*, 800 F.2d 386, 390 (4th Cir. 1986); cf. *Simmons* v. *United Mortgage & Loan Inv., LLC*, 634 F.3d 754, 764-765 (4th Cir. 2011) (only settlement offers that offer judgment can moot a claim). The rationale behind those decisions appears to be that a defendant's "offer[] to satisfy the plaintiff's entire demand" leaves "no dispute over which to litigate," and that "a plaintiff who refuses to acknowledge this loses outright" and must suffer entry of a "judgment against him" because "he has no remaining stake." *Rand*, 926 F.2d at 598. That rationale is flawed.

To the extent the mootness-by-unaccepted-offer theory imposes dismissal as a litigation penalty for persisting with a claim notwithstanding the offer, it is erroneous. If a plaintiff has Article III standing to invoke federal jurisdiction to seek legitimate redress, we are aware of no judicial power to force the plaintiff involuntarily to *accept* a defendant's post-suit settlement offer. Such compulsion would be inconsistent with the basic contract principle of mutual assent. Cf. 1 Restatement (Second) of Contracts § 18, at 53 (1981). And nothing in Rule 68's litigation-cost consequences for a plaintiff who

recovers no more than an unaccepted offer authorizes dismissal of the plaintiff's underlying claim.[1]

The notion that a case is mooted by an offer of complete relief may reflect a reluctance to expend judicial and litigation resources resolving the merits of a claim that the defendant informs the court it will fully satisfy. That legitimate impulse, however, suggests that the court should enter judgment *for* the plaintiff, not against her. The Second Circuit thus has correctly held that a controversy "is still alive" after a plaintiff rejects a settlement offer for full relief, which the plaintiff is "not obliged to take." *McCauley* v. *Trans Union, LLC*, 402 F.3d 340, 342 (2005). Rather than dismiss the live dispute, the Second Circuit concluded, the "better resolution" is simply to enter a "default judgment against [the

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[1] In *Russell* v. *United States*, 661 F.3d 1371, 1374-1375, 1377 (2011), the Federal Circuit accepted the government's argument as appellee that the damages claim of the named plaintiff was rendered moot by the government's tender of a check that—like its payments to thousands of others in the putative class—covered the full amount claimed by the plaintiff (who declined to cash the check). The government relied on Federal Circuit precedent, which the government, after further analysis, has concluded is incorrect.

When a plaintiff timely seeks retrospective relief for a past wrong, the wrong has been completed by the time the claim is filed. Any damages liability therefore is fixed and will continue until the claim is resolved by a judgment or a settlement agreement grounded, like any contract, on mutual assent. Different considerations apply when a plaintiff seeks prospective relief for an ongoing or imminent injury caused by the defendant's challenged actions. If the defendant ceases those actions after the action is filed, it can terminate the underlying injury and associated liability for prospective relief, regardless of the plaintiff's consent. In that "voluntary cessation" context, the claim for prospective relief becomes moot if it is "absolutely clear" that the "allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 189-190.

defendant]" for all the relief requested if the defendant has notified the court that it prefers to accept the judgment and avoid litigation. *Ibid.* Other courts have similarly held that plaintiffs do not "lose[] outright when [they] refuse[] an offer of judgment that would satisfy [their] entire demand" and that district courts may then properly "enter judgment[s] for the plaintiffs in accordance with the defendants' * * * offer" of judgment. See *O'Brien* v. *Ed Donnelly Enters., Inc.*, 575 F.3d 567, 575 (6th Cir. 2009). In other words, if the defendant has "thrown in the towel," there normally is "nothing left for the district court to do except enter judgment" for the plaintiff based on the defendant's "consent[] to its entry," even if the plaintiff does "not consent" to a judgment in his favor. *Chathas* v. *Local 134*, 233 F.3d 508, 512-513 (7th Cir. 2000) (Posner, J.), cert. denied, 533 U.S. 949 (2001).[2]

That is a proper course to follow when further litigation would serve no purpose. "[T]he principle of party presentation [is] basic to our adversary system," *Wood* v. *Milyard*, 132 S. Ct. 1826, 1833 (2012), which rests on the "premise that the parties know what is best for them" and "rel[ies] on the parties to frame the issues for decision," *Greenlaw* v. *United States*, 554 U.S. 237, 243-244 (2008). Courts regularly accept express waivers in litigation. A defendant may elect not to contest liability

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[2] A judgment based on the defendant's consent does not have any future issue-preclusive effect, because the merits are not "actually litigated and determined" and the judgment does not rest on a resolution of the merits. *Bobby* v. *Bies*, 556 U.S. 825, 834 (2009) (citation omitted); see 1 Restatement (Second) of Judgments § 27 cmt. e, at 257 (1982) (Issue preclusion does not apply "[i]n the case of a judgment entered by confession, consent, or default," absent an agreement that the judgment will have issue-preclusive effect.).

and litigate only the scope of relief. Or a defendant may decide not even to contest relief. If a defendant knowingly chooses to accept an adverse judgment for the full relief sought rather than litigate the merits, a court may rely on that choice and enter judgment upon it. But that did not happen here, and respondent's individual claim therefore remains alive. For that reason, the Court should affirm the court of appeals' reversal of the district court's dismissal of respondent's FLSA claim and its order remanding the case to the district court.

B. A District Court Must Proceed Through The Collective-Action Certification Process Before It May Enter Judgment For A Named Plaintiff On Her Individual Claim Over Her Objection

If, on remand, petitioners re-extend and respondent does not accept an offer of judgment, the district court should follow the procedure identified in *Hoffman-La Roche, Inc.* v. *Sperling*, 493 U.S. 165 (1989), before deciding whether to enter judgment for respondent on her individual claim based on petitioners' consent. In the context of a collective action, Section 216(b) limits a district court's discretion to enter judgment for the named plaintiff on her individual claim over her objection, even if the defendant consents to judgment. A named plaintiff need not accept a settlement that does "not offer[] all that has been requested in the complaint (*i.e.*, relief for the class)," *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 341 (1980) (Rehnquist, J., concurring), and Section 216(b) gives an FLSA plaintiff a statutory right to bring a collective action on behalf of herself and others similarly situated. When a plaintiff invokes that right, the district court must first discharge its "managerial responsibility to oversee the joinder of additional parties," *Hoffman-La Roche*, 493 U.S. at 171, before de-

termining whether to enter judgment for the plaintiff on her individual claim.

In the Rule 23 class-action context, this Court has determined that it "would be contrary to sound judicial administration" to permit a defendant "to 'buy off' the individual private claims of [a] named plaintiff[]" who has refused the defendant's settlement offer, if doing so would prevent a full determination of whether the action may proceed on behalf of others. *Roper*, 445 U.S. at 339. "Requiring multiple plaintiffs to bring separate actions, [each of] which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained," would "invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement" and "frustrate the objectives of class actions," which enable the streamlined and cost-efficient "vindication of legal rights" by multiple plaintiffs in a single suit. *Id.* at 338-339.

Those considerations apply at least as strongly to collective actions under the FLSA. Congress expressly conferred a "right" on employees to bring a collective action on "behalf of * * * themselves and any other employees similarly situated." 29 U.S.C. 216(b); see *Hoffman-La Roche*, 493 U.S. at 170. That "explicit statutory direction of a single [FLSA] action for multiple [FLSA] plaintiffs" (*id.* at 172) is "designed to serve the important function of preventing [FLSA violations]" by "lower[ing] individual costs to vindicate rights" in a process that allows the "efficient resolution in *one* proceeding of common issues of law and fact." *Id.* at 170-171 (emphasis added). Section 216(b) sets forth Congress's "policy that [FLSA] plaintiffs should have the opportunity to proceed collectively" and, as this Court

has held, the "broad remedial goal of the statute should be enforced to the full extent of its terms." *Id.* at 170, 173.

Section 216(b) therefore vests in district courts the "managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way." *Hoffman-La Roche*, 493 U.S. at 171. That responsibility includes the use of "[c]ourt authorization of notice" to potential opt-in plaintiffs, which furthers "the legitimate goal of avoiding a multiplicity of duplicative suits." *Id.* at 172. Although a district court is to exercise sound discretion, it cannot properly discharge that responsibility in a manner that contravenes the statutory policy of giving employees the "opportunity to proceed collectively," *id.* at 170. See *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001) (A court cannot exercise its discretion in a way that "override[s] Congress' policy choice."); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975) ("discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles'") (quoting *United States* v. *Burr*, 25 F. Cas. 30, 35 (C.C.D. Va. 1807) (No. 14,692d) (Marshall, C.J.)). The court should therefore allow the process of proposed collective-action "certification" to proceed in the same manner that it would in the absence of a defendant's settlement offer (by deciding whether to authorize court-approved notice with a designated opt-in period) before deciding whether to enter judgment for the plaintiff on her individual claim over her objection. In other words, "sound judicial administration" requires that the collective-action process proceed unaffected by a defendant's attempt "to 'buy off' the individual private claims of the named plain-

tiffs," because allowing plaintiffs to be "picked off" before the process completes "would frustrate the objectives of [collective] actions" and subvert the intended operation of the FLSA. See *Roper*, 445 U.S. at 339.

If a district court rejects conditional certification before entering judgment for (or against) a plaintiff on the merits, the plaintiff could appeal that ruling once final judgment is entered. See *McElmurry* v. *U.S. Bank Nat'l Ass'n*, 495 F.3d 1136, 1141-1142 (9th Cir. 2007); *Lusardi* v. *Lechner*, 855 F.2d 1062, 1068 (3d Cir. 1988). Such an appeal would be necessary both to vindicate the plaintiff's statutory right to proceed collectively and her right to decline a settlement offer that itself fails to "offer[] all that has been requested in the complaint (*i.e.*, relief for the class)," *Roper*, 445 U.S. at 341 (Rehnquist, J., concurring).

C. This Court Should Determine That Respondent's Individual FLSA Claim Is Not Moot Or, Alternatively, Dismiss The Writ As Improvidently Granted

The court of appeals' analysis began with the premise —derived from its circuit precedent—that a defendant's offer of full relief will generally moot a plaintiff's claim. Pet. App. 14. That Article III premise gave rise to the court's concern that a defendant could unilaterally terminate a collective action by "picking off" the named plaintiff through an offer to pay only her individual claim, and its conclusion that relation-back principles should be invoked to avoid such "undesirable strategic use of Rule 68." *Id.* at 22, 24-26, 28 (citation omitted). Although respondent does not appear to have previously contested the circuit precedent that made that premise obligatory, this Court should resolve that question and hold that an unaccepted offer of judgment does not moot a plaintiff's individual claim.

1. The question presented in the certiorari petition is whether a collective action becomes moot "when the lone [named] plaintiff *receives an offer* from the defendants to satisfy all of the plaintiff's claims." Pet. i (emphasis added). Because the overall case obviously is not moot if the named plaintiff's personal claim remains live, the question that petitioners framed and the Court granted certiorari to decide necessarily asks two related questions: First, whether respondent's "recei[pt]" of petitioners' "offer" mooted her individual claim on the merits; and second, if it did, whether the collective action as a whole was also rendered moot. The first is a logically "prior question," *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 381-382 (1995), and this Court should resolve it as a necessary "'predicate to an intelligent resolution' of the question presented." *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996).

Indeed, that predicate drove the court of appeals' Article III analysis; its concern that defendants' strategic use of offers of judgment could contravene "the purposes behind [Section] 216(b)" by rendering claims in collective actions "acutely susceptible to mootness" before the certification process could be completed; and its invocation of relation-back principles to address that concern. Pet. App. 26 (citation omitted). It is a close question whether mootness jurisprudence developed for class actions should extend to the collective-action context here. See pp. 29-32, *infra*. The Court should not resolve that more difficult constitutional question without first addressing the more straightforward Article III predicate underlying it. If the Court were merely to assume *arguendo* the mootness of respondent's individual claim, the Court would decide this case on a purely legal assumption about Article III jurisdiction that could

later be "show[n] to be ridiculous, a risk that ought to be avoided," *Lebron*, 513 U.S. at 382. The assumed mootness of respondent's claim is so central to the proper analysis that, if this Court were to decide not to examine it, the United States suggests that the Court should consider dismissing the writ as improvidently granted in order to await a case in which it may decide the entire question without an artificial Article III assumption.

2. Although a respondent generally may make any legal argument in support of the judgment below, *Bondholders Comm.* v. *Commissioner*, 315 U.S. 189, 192 n.2 (1942), this Court normally requires a cross-petition if the court of appeals' judgment would be altered by accepting such an argument, *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364-365 (1994), and has "repeatedly expressed th[at] rule in emphatic terms," *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 481 n.3 (1993). Respondent did not file a cross-petition. That omission, however, does not prevent this Court from deciding whether respondent's individual claim was rendered moot by petitioners' offer.

As an initial matter, holding that respondent's individual claim is not moot would not actually expand the court of appeals' judgment. That judgment reversed outright the district court's judgment dismissing petitioner's "FLSA claim," which consisted of her claim on her own behalf and on behalf of other similarly situated employees. Pet. App. 29, 45-46. Moreover, in reversing, the court of appeals extended (*id.* at. 20-26) the logic of its prior decision in *Weiss*, *supra*, which, *inter alia*, recognized that a plaintiff need not accept a settlement offer if "the defendant has not offered all that has been requested in the complaint (i.e. relief for the class)." 385 F.3d at 343 (quoting *Roper*, 445 U.S. at 341 (Rehnquist,

J., concurring)). Apparently drawing on that principle, the court of appeals here concluded that respondents' "Rule 68 offer of judgment would no longer satisfy the claims of everyone," and therefore would not warrant "dismissing the complaint," if the certification process allows the case to move forward with at least one opt-in plaintiff. Pet. App. 29. The court's conclusion that, "[i]f" the request to proceed as a collective action is denied, the offer fully satisfying the individual claim "would moot the action," *ibid.*, is consistent with treating the whole action, including respondent's individual claim, as live until it can be determined whether petitioners' offer would satisfy every claim in the case on remand.

In any event, the Court has, on rare occasions, expanded a court of appeals' judgment in a respondent's favor without a cross-petition without expressly discussing the cross-petition rule. See, *e.g.*, *Honig* v. *Doe*, 484 U.S. 305, 325 n.8, 328-329 (1988) (modifying judgment for student respondents by reducing length of suspension triggering protective statute from 30 to 10 schooldays); *Bay Ridge Operating Co.* v. *Aaron*, 334 U.S. 446, 477 (1948) (modifying remand order in FLSA class action to allow district court to consider amendments to complaint and further evidence from employee-respondents); *Hague* v. *Committee for Indus. Org.*, 307 U.S. 496, 518 (1939) (opinion of Roberts, J.) (modifying injunction for respondents to eliminate provisions allowing municipal petitioner to deny public-meeting permits and declaring ordinance void in its entirety). Even if the Court were to conclude, contrary to our submission above, that a determination that respondent's personal claim is not moot would expand the judgment of the

court of appeals, this case presents a rare instance in which a cross-petition should not be required.

As noted, the question whether respondent's individual claim is moot is subsumed in the question that *petitioners* present and the Court has granted certiorari to review. That broader question presented and the court of appeals' rationale cannot be adequately reviewed without deciding whether petitioners' unaccepted "offer" has mooted respondent's individual claim on the merits. It is especially important for the Court to consider the issue because it concerns the Article III jurisdiction of both the courts below and this Court. That Article III question should not be resolved on the basis of an erroneous predicate legal assumption. And that antecedent issue, which has produced divergent answers in the courts of appeals (see pp. 12-14, *supra*), is itself sufficiently important to warrant this Court's attention.

There is no statutory bar to the Court's deciding that predicate Article III issue, because the Court's cross-petition requirement is not jurisdictional. Congress has authorized this Court to exercise jurisdiction over "*[c]ases* in the court of appeals" "[b]y writ of certiorari granted upon the petition of *any party*." 28 U.S.C. 1254(1) (emphases added). Although this Court as a matter of sound discretion normally limits its review to the "questions set out in the petition, or fairly included therein," Sup. Ct. R. 14.1(a); see *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 32 (1993) (per curiam)—a standard that in fact is satisfied in this case—a grant of certiorari under Section 1254 vests the Court with jurisdiction to decide the entire "case[]" as it stood "in the court of appeals." The origins of statutory certiorari jurisdiction and the Court's practice confirm that conclusion.

This Court was "the single tribunal" for final appellate review of "all cases and questions of a Federal nature" until 1891, when Congress passed the Evarts Act, ch. 517, 26 Stat. 826, to create the courts of appeals and relieve this Court's crowded docket. *Forsyth* v. *Hammond*, 166 U.S. 506, 511-512 (1897). Section 6 of the Act, however, preserved this Court's power to control the "litigation in all the Courts of Appeal," *id.* at 514, by authorizing the Court to order "by certiorari" that "any * * * case" pending in a court of appeals "be certified to the Supreme Court for its review and determination with the *same power and authority* in the case as if it had been carried by appeal or writ of error to the Supreme Court." *Id.* at 513 (quoting 26 Stat. 828) (emphasis added). This Court has long recognized that its "*comprehensive and unlimited power*" to "reach out [a] writ of certiorari and transfer the case here for review and determination," *ibid.* (emphasis added), confers the "power to decide the case as it was presented to the * * * Court of Appeals," *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U.S. 257, 267 (1910); see *Gay* v. *Ruff*, 292 U.S. 25, 30 (1934), by making the "whole case * * * open to [this Court's] review," *Brown* v. *Fletcher*, 237 U.S. 583, 587 (1915), see *American Constr. Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 382, 385 (1893).[3]

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[3] The question whether the cross-petition rule is jurisdictional is distinct from the question whether the cross-appeal rule is jurisdictional, because, as noted, Congress created the Court's certiorari jurisdiction to vest this Court with discretion to step into the shoes of a court of appeals with the power to decide the case as would that court. The Court has declined to decide whether the cross-appeal rule is jurisdictional. *Greenlaw*, 554 U.S. at 245; cf. *id.* at 255 (Breyer, J., concurring in the judgment) (it is not jurisdictional); *id.* at 256-257 (Alito, J., dissenting) (same).

Congress later amended Section 6's successor to specify that a writ of certiorari confers the "same power and authority * * * as if the cause had been brought [to this Court] by *unrestricted* writ of error or appeal," 28 U.S.C. 347(a) (1925) (emphasis added), in order to confirm the Court's power to review "the entire merits of the controversy, whatever the controversy may be." 66 Cong. Rec. 2919 (1925) (statement of Sen. Cummins). Although text expressly specifying the breadth of the Court's certiorari jurisdiction was omitted when Congress codified Title 28 in 1948, the revision "preserve[d] existing law" and thus "retain[ed] the power of unrestricted review of cases * * * brought up on certiorari." 28 U.S.C. 1254 note; see *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957) ("[N]o changes of law or policy are to be presumed from changes of language" in the 1948 codification "unless an intent to make such changes is clearly expressed.").

The Court's sound practice of issuing "order[s] limiting the grant of certiorari" to particular questions thus is not "a jurisdictional bar" limiting the power to decide "questions outside the scope of the limited order" if "necessary for the proper disposition of the case." *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 247 n.12 (1981). The Court's power to grant certiorari before judgment by a court of appeals similarly reflects that the grant of certiorari authorizes the Court—as Section 1254(1)'s text indicates—to review the entire "[c]ase[] in the court of appeals."

Decisions reflecting the Court's traditional "practice" of requiring a "cross petition for certiorari" likewise do not "deny the *power* of the [C]ourt to review [such] objections" without a cross-petition if the case is properly before it on certiorari. *Langnes* v. *Green*, 282 U.S. 531,

536-538 (1931) (dictum). For that reason, notwithstanding 28 U.S.C. 2101(c)'s jurisdictional period for seeking certiorari, *Bowles* v. *Russell*, 551 U.S. 205, 212 (2007), the Court's rules expressly permit the granting of a cross-petition that would be "jurisdictionally out of time," Sup. Ct. R. 12.5, 13.2, so long as "another party's timely petition for a writ of certiorari is granted," Sup. Ct. R. 13.4. See 445 U.S. 1005, 1007 (1980) (adopting predecessors). The Court has thus repeatedly granted cross-petitions that would have been jurisdictionally untimely as freestanding petitions. See, *e.g.*, *Sawyer* v. *Iqbal*, 556 U.S. 1256 (2009) (No. 07-1150) (petition filed 171 days after denial of rehearing); *Jett* v. *Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989) (No. 88-214) (167 days); *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988) (No. 87-929) (183 days); *CIA* v. *Sims*, 471 U.S. 159 (1985) (No. 83-1249) (163 days).

II. AN FLSA COLLECTIVE ACTION MAY BECOME MOOT IF THE NAMED PLAINTIFF'S INDIVIDUAL CLAIM BECOMES MOOT

If the Court concludes that petitioners' Rule 68 offer did not moot respondent's personal claim, then the Court need not decide whether an FLSA collective action becomes moot if the named plaintiff's claim becomes moot before another plaintiff opts in. If, however, the Court determines that the offer of judgment mooted respondent's claim, the collective action here may likewise be moot.

It is settled that "an actual controversy must be extant at all stages of review" to sustain Article III jurisdiction. *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (citation omitted). A putative class action thus will become moot once "a case or controversy no longer exists between the named plaintiffs and

the [defendants]" unless there is another basis for ongoing jurisdiction. *Board of Sch. Comm'rs* v. *Jacobs*, 420 U.S. 128, 129 (1975) (per curiam). This Court has found an ongoing dispute when (1) the named plaintiff retains a separate financial interest in class certification, see *Roper*, *supra*; (2) the class is deemed to acquire a separate legal status before the named plaintiff's claim became moot, see *Sosna* v. *Iowa*, 419 U.S. 393 (1975); *Geraghty*, *supra*; or (3) the claims are "so inherently transitory" that there would not have been enough time to resolve class certification before the named plaintiff's claim expires, see *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 52 (1991); *Gerstein* v. *Pugh*, 420 U.S. 103 (1975). One of those circumstances may apply here.

A. In *Roper*, after the district court denied class certification, it entered judgment for the named plaintiffs over their objection (based on the defendant's offer to pay their individual claims in full) and dismissed the case. 445 U.S. at 329-330. This Court held that the district court's disposition of the named plaintiffs' damages claims had not yet mooted their "individual and private case or controversy." *Id.* at 332-333. The Court reasoned that the named plaintiffs' ongoing "economic interest in class certification" allowed them to appeal the adverse certification ruling and that the case remained live pending "absolute finality of [the] judgment" such that an "appeal of the adverse certification ruling" could proceed, even though the plaintiffs had "prevailed on the merits" and the basis for their appeal (Rule 23) was an ancillary "procedural right" to "assert their own claims in the framework of a class action." *Id.* at 332-334, 340.

The *Roper* plaintiffs had an economic interest in class certification because, the Court concluded, they could seek compensation for attorney's fees and costs in-

curred on behalf of the class if other class members recovered damages. 445 U.S. at 334 n.6, 336, 338 n.9; cf. *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 257-258 (1975) (discussing such compensation).[4] That interest in recovering uncompensated costs from potential co-plaintiffs can exist if the court fails to certify a class or collective action, because even if the plaintiff obtains "reasonable" attorney's fees and costs from the defendant for prevailing on her individual claim, her separate expenditures on the "unsuccessful [certification] claim" should be "excluded in considering the amount of a reasonable fee" award. See *Hensley* v. *Eckerhart*, 461 U.S. 424, 435, 440 (1983).

Respondent thus could continue to pursue collective-action certification to recover her distinct expenditures for the collective aspect of this litigation. Moreover, to the extent respondent claims an "incentive award" for advancing collective interests, see *Espenscheid* v. *DirectSat USA, LLC*, 688 F.3d 872, 876-877 (7th Cir. 2012), that financial interest should similarly enable respondent to pursue certification. Those questions could be considered by the district court on remand if the Court were to hold that respondent's individual claim on the merits is moot.

B. *Sosna* and *Geraghty* rest on the theory that a class acquires independent legal status at the time of a court's certification order, including a denial of certification corrected on appeal that "relates back" to the date of the

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[4] Although an interest in obtaining an award of attorney's fees and costs is insufficient to permit litigation of the merits, see *Lewis* v. *Continental Bank Corp.*, 494 U.S 472, 480 (1990), *Roper* recognized ongoing Article III jurisdiction to litigate a "collateral" ruling (class certification) in which the court will not "pass[] on the merits." 445 U.S. at 336.

erroneous denial. At that point, unnamed class members will have a live case or controversy that can sustain Article III jurisdiction even if the named plaintiff's personal claim subsequently expires. That rationale does not directly apply to collective actions.

Sosna held that unnamed members of a class "acquire[] a legal status separate from the interest asserted by the [named plaintiff]" "[w]hen the District Court certifie[s]" a class action. 419 U.S. at 399. A case or controversy will therefore exist at all times if the named plaintiff's claim remains live "at the time the class action is certified," and a controversy continues between the "defendant and a member of the [certified] class" after "the claim of the named plaintiff has become moot." *Id.* at 402; see *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 753-756 (1976) (discussing *Sosna*).

Geraghty extended *Sosna* by applying a "'relation back' approach" to permit a named plaintiff challenging the prospective application of parole-release guidelines to appeal the denial of class certification, even though his release from prison during the appeal had mooted his personal claim on the merits. 445 U.S. at 393-394, 397-398. The Court concluded that "at least some members of the [putative] class" the named plaintiff "s[ought] to represent" continued to have a "live" dispute with the defendants, *id.* at 396, and that the plaintiff retained a sufficient "personal stake" in vindicating his "right to have a class certified" to prosecute the class-certification appeal, *id.* at 403-404.

By identifying a live controversy between putative class members and the defendants, *Geraghty* appears to have concluded that the putative members' claims were sufficient to permit a class-certification appeal by the plaintiff, because the appeal would determine whether

the class (and the class claims) should have obtained independent legal status when the district court denied certification, *i.e.*, before the plaintiff's personal claim had expired. *Geraghty* thus "h[e]ld that when a District Court erroneously denies a procedural motion [for class certification], which, if correctly decided, would have prevented the action from becoming moot, an appeal lies from the denial and the corrected ruling 'relates back' to the date of the original denial." 445 U.S. at 406-407 n.11. That nunc-pro-tunc rationale of appellate correction, however, would not preserve a case that had already become moot before the challenged ruling. *Geraghty* accordingly stated that "[i]f the named plaintiff has no personal stake in the outcome at the time class certification is denied, relation back of [the] appellate reversal of that denial still would not prevent mootness of the action." *Id.* at 407 n.11.

The court of appeals concluded that a motion for "conditional certification" could "relate back" to the date of the complaint, Pet. App. 28-29, but that reasoning is insufficient to support its ruling. Unlike a class-certification order, which immediately makes the class a legal entity in the suit, conditional certification results in court-approved written notice to employees who may then decide to opt into the action. See pp. 3-4, *supra*. It does not bring any plaintiffs into the case, because a plaintiff may join a collective action only by filing her opt-in consent. See 29 U.S.C. 216(b), 256(b); pp. 2-3, *supra*. If no additional plaintiff opts in before the named plaintiff's personal claim expires, then without more the action will have already lost its live status.

C. Finally, this Court has deemed claims for prospective relief "capable of repetition, yet evading review" with respect to a non-certified putative class in a "nar-

row class of cases" in which (1) it is "certain that other persons similarly situated" to the named plaintiff will continue to be exposed to the challenged conduct[5] that (2) "is by [its] nature temporary" and may not affect the named plaintiff "long enough" to "certify the class" before his personal claim expires. *Gerstein*, 420 U.S. at 110 n.11; *id.* at 106-107 (pretrial detention for a month or more without judicial probable-cause determination). In such circumstances, the Court has permitted ongoing litigation "after the named plaintiff's claim ha[s] become moot," because the underlying claim is "so inherently transitory" that the trial court would otherwise "not have even enough time to rule on a motion for class certification." *McLaughlin*, 500 U.S. at 51-52 (warrantless detention up to seven days without a judicial probable-cause determination) (citation omitted); see, *e.g.*, *Swisher* v. *Brady*, 438 U.S. 204, 214 n.11 (1978) (juvenile-court procedure for which "the rapidity of judicial review * * * create[d] mootness questions" before the district court "c[ould] reasonably be expected to rule on a certification motion") (citation omitted). Class certification in such cases "can be said to 'relate back' to the filing of the complaint." *Ibid.* (quoting dictim in *Sosna*, 419 U.S. at 402 n.11). Although the question is close, the foregoing logic should not be extended to this case.

Damage claims like respondent's are not by nature "inherently transitory" because claims for retrospective relief remain live until resolved or settled. The Third Circuit in *Weiss* nonetheless reasoned that a similar analysis should apply if defendants employ the "tactic of

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[5] By contrast, the Court's traditional capable-of-repetition-yet-evading-review doctrine requires a reasonable expectation that the same plaintiff will again be subject to the time-limited action. *Turner* v. *Rogers*, 131 S. Ct. 2507, 2515 (2011).

'picking off' lead plaintiffs with a Rule 68 offer," thus rendering the underlying claims "acutely susceptible to mootness." 385 F.3d at 347 (citation omitted). The court applied that logic here, Pet. App. 26, to disregard the temporal gap between the date on which respondent's personal claim could be deemed moot (because of the unaccepted settlement offer) and the possible future appearance of another plaintiff. That reasoning would have force as a practical matter if its premise that damages claims can be rendered moot by an unaccepted settlement offer were correct. But that premise is clearly wrong, see pp. 10-14, *supra*, and this Court should not give expansive scope to the Judiciary's Article III power simply to mitigate the adverse consequences of the Third Circuit's separate legal error about the Article III effect of a mere settlement offer.

But if the Third Circuit's premise were correct, it would be a difficult judgment whether to extend a capable-of-repetition rationale to this context. Such an extension would reduce the significant potential for frustrating collective actions pursuing legitimate redress for significant violations of statutory rights and avoid the cost on the judicial system of entertaining serial collective-action suits that would be rendered moot by successive offers to pay just an individual claim. Moreover, the specter of such successive short-lived suits parallels the prospect of successively mooted class actions addressed by *Gerstein* and *McLaughlin*, particularly where, as here, respondent alleges a significant class of employees with similar claims.

On balance, however, we conclude that the Third Circuit's theory sweeps too broadly to be in keeping with the Court's "narrow class of cases" addressing inherently transitory claims for prospective relief. Under the

Third Circuit's theory, practically every damages claim advanced in a collective action could be viewed as "acutely susceptible to mootness" if settlement is offered. Yet "the capable-of-repetition doctrine [as traditionally framed] applies only in exceptional situations," *City of L.A.* v. *Lyons*, 461 U.S. 95, 109 (1983), and this Court has not suggested that that stringent standard should be relaxed. Moreover, unlike claims for prospective relief challenging allegedly continuing unlawful conduct, purely retrospective claims address completed harms. The mootness question here thus ultimately concerns the potential for damages claims by employees who have not filed their own action and have not opted into this action, either because they are unaware of it or because they chose not to participate. Those damages claims are not themselves capable of repetition yet evading review.

CONCLUSION

The judgment of the court of appeals should be affirmed or, alternatively, the petition for a writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 1254 provides:

Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

2. Section 240 of the Judicial Code of 1911, ch. 231, 36 Stat. 1157, as amended (28 U.S.C. 347(a) (1946)), provided in pertinent part:

In any case, civil or criminal, in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like ef-

fect, as if the cause had been brought there by unrestricted appeal.

* * * * *

3. Section 6 of the Evarts Act (Circuit Court of Appeals Act) of 1891, ch. 517, 26 Stat. 828, provided in pertinent part:

That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, * * * *

And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

* * * * *

4. 29 U.S.C. 216(b) provides:

Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compen-

sation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

5. 29 U.S.C. 255 provides in pertinent part:

Statute of Limitations

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], the Walsh-Healey Act * * * , or the Bacon-Davis Act—

(a) if the cause of action accrues on or after May 14, 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

* * * * *

6. 29 U.S.C. 256 provides:

Determination of commencement of future actions

In determining when an action is commenced for the purposes of section 255 of this title, an action commenced on or after May 14, 1947 under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], the Walsh-Healey Act * * * , or the Bacon-Davis Act, shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended, or the Bacon-Davis Act, it shall be considered to be commenced in the case of any individual claimant—

(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or

(b) if such written consent was not so filed or if his name did not so appear—on the subsequent date on which such written consent is filed in the court in which the action was commenced.

7. Rule 68 of the Federal Rules of Civil Procedure (as amended effective December 1, 2009) provides:

Offer of Judgment

(a) MAKING AN OFFER; JUDGMENT ON AN ACCEPTED OFFER. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(b) UNACCEPTED OFFER. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

(c) OFFER AFTER LIABILITY IS DETERMINED. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable

time—but at least 14 days—before the date set for a hearing to determine the extent of liability.

(d) PAYING COSTS AFTER AN UNACCEPTED OFFER. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

8. Rule 68 of the Federal Rules of Civil Procedure, 28 U.S.C. App. at 72 (Supp. II 2008), provided in pertinent part:

Offer of Judgment

(a) MAKING AN OFFER; JUDGMENT ON AN ACCEPTED OFFER. More than 10 days before the trial begins, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 10 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

* * * * *

(c) OFFER AFTER LIABILITY IS DETERMINED. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 10 days—before a hearing to determine the extent of liability.

* * * * *

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-1059

In The
Supreme Court of the United States

GENESIS HEALTHCARE CORPORATION AND
ELDERCARE RESOURCES CORP.,

Petitioners,

v.

LAURA SYMCZYK,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF *AMICUS CURIAE* OF ACA INTERNATIONAL IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, ACA International ("ACA"), is a nonprofit corporation founded in 1939 and based in Minneapolis, Minnesota. ACA is an association of credit, collection, and debt-purchasing professionals who provide a wide variety of accounts-receivable management services. ACA's interests in this matter are both public and private.

ACA represents approximately 5,500 third-party collection agencies, asset buyers, attorneys, credit grantors, and vendor affiliates. ACA's members include sole proprietorships, partnerships, and corporations ranging from small businesses to firms employing thousands of workers. Also included among its membership are approximately 3,000 third-party debt collection companies, 650 credit grantors, 225 asset buyers, 200 vendor affiliates, and 850 in-house, compliance, defense, or collection attorneys.

ACA members range in size from small businesses with several employees to large, publicly held corporations. Together, ACA members employ close to 150,000 workers. These members include the very smallest of businesses that operate within a limited geographic range of a single state as well as the very

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief pursuant to Rule 37.3.

largest of multinational corporations that operate in every state and non-U.S. jurisdictions. Approximately 2,000 of the company members of ACA maintain fewer than ten employees and more than 2,500 of the members employ fewer than twenty persons. Many of the companies are wholly or partially owned or operated by minorities or women. ACA helps its members serve their communities and meet the challenges created by changing markets through leadership, education, and service. ACA continually educates its members and others on the law governing debt collection practices, including the Fair Debt Collection Practices Act ("FDCPA") and the Telephone Consumer Protection Act ("TCPA") in addition to numerous other federal and state laws.

In the process of attempting to recover outstanding accounts and balances, ACA members act as an extension of every community's businesses. They represent the local hardware store, the retailer down the street, and the family doctor. ACA members work with these businesses, large and small, to obtain payment for the goods and services delivered to consumers. Each year, the combined effort of ACA members results in the recovery of billions of dollars that are returned to business and then reinvested in local communities. Without an effective collection process, the economic viability of these businesses and, by extension, the local and national economies in general are threatened; at the very least, citizens would be forced to pay inflated prices to compensate for uncollected debts.

ACA members are acutely aware of the economic costs of litigation in statutory fee shifting cases, and often champion the purposes served by Rule 68 in that context. As such, ACA's members have a perspective on the operation of mootness principles in the confines of federal statutory actions, some of which involve fee shifting, that ACA believes is both relevant and will help the Court in deciding this matter.

Amicus curiae ACA urges the Court to reverse the Third Circuit's decision and find that the offer of complete relief made to respondent mooted both her claim and her action.

SUMMARY OF THE ARGUMENT

The Third Circuit has unmoored mootness doctrine from Article III, allowing prudential considerations to eclipse the constitutional requirement of a live controversy at all stages of the proceeding. The "pick-off" problems identified by the Third Circuit are in reality constrained by the economic cost of making successive offers of judgment; it's decision promotes filing of disingenuous class allegations in every lawsuit, and promotes waste. Giving effect to an individual offer of judgment before certification is sought does not undercut the viability of class actions, or waste judicial resources. Before class certification is sought, there is no "class" interest at stake.

A party suing over the deprivation of a dollar has a justiciable controversy as long as the Court has

within its power to grant judgment for that dollar. Once the dollar is awarded, recovered or voluntarily repaid, the controversy evaporates. Used judiciously, offers of judgment that afford complete relief in such actions help bring closure to litigation, saving scarce judicial resources and curtail runaway litigation costs.

Accordingly, *amicus* ACA respectfully urges the Court to reverse the judgment of the Third Circuit in this case.

ARGUMENT

I. A justiciable controversy no longer exists after an offer of judgment affording complete relief has been tendered.[2]

This Court has approached the case or controversy requirement of Article III by exploring the fit between the nature of the interests at stake, the remedies sought, and the relief available. *Friends of the Earth, Inc. v. Laidlaw Environmental Services*

[2] ACA confines its discussion of mootness to the class action context, despite some notable differences between collective actions and class actions. 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 2:16 (8th ed. 2011) (hereinafter "MCLAUGHLIN ON CLASS ACTIONS") (highlighting distinctions). *But see Espenscheid v. DirectSat USA, L[illegible]* ___ F.3d ___, 2012 WL 3156326, *4 (7th Cir. 2012) ("Courts treat them [collective actions] as the equivalent of class actions – . . . except that in a collective action unnamed plaintiffs need to opt in to be bound, rather than, as in a class action, opt out not to be bound.").

(TOC), Inc. 528 U.S. 167, 191-92 (2000); *Camreta v. Greene*, 131 S.Ct. 2020, 2028, 179 L.Ed.2d 1118 (2011); U.S. CONST. art. III § 2. In the context of each case, measuring the relief sought against the judicial power to grant meaningful relief, ensures that only live controversies consume the Court's attention. *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1938).

It is clear that before a class action is certified, non-named members of a putative class are not parties to the action. *Smith v. Bayer Corp.*, 131 S.Ct. 2368, 2379, 180 L.Ed.2d 341 (2011). It is also clear that before a class action is certified, and before a motion for class certification is filed, the named plaintiff's claims can expire and render the entire action moot. *Board of School Commissioners v. Jacobs,* 420 U.S. 128, 130 (1975). To the extent the named plaintiff in a putative class action has an interest in spreading the costs of the action onto unnamed class members, that pecuniary interest is sufficient to keep the action alive for purposes of appealing an adverse ruling on class certification after mooting the named plaintiff's individual claims. *Camreta v. Greene*, 131 S.Ct. 2020, 2039, 179 L.Ed.2d 1118 (Kennedy, J., dissenting). "[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims. Should these substantive claims become moot in the Art. III sense, by settlement of all personal claims for example, the court retains no jurisdiction over the controversy of the individual plaintiffs." *Deposit Guaranty Nat. Bank,*

Jackson, Miss. v. Roper, 445 U.S. 326, 332 (1980). However, "[n]either the rejected tender nor the dismissal of the action over plaintiffs' objections mooted the plaintiffs' claim on the merits *so long as they retained an economic interest in class certification*." *Id.* at 332-33 (emphasis added).

What remains unanswered, and the issue which has divided the Courts, is whether a putative class representative with no live personal interest at stake (after having received an offer of judgment affording complete individual relief, including her costs), nonetheless satisfies the controversy requirement of Article III solely by virtue of the future prospect of an unexercised procedural interest in representing others where no motion for class certification was ever filed. *See* 13C CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3533.9.1 (3d ed. 2008) (hereinafter "FEDERAL PRACTICE AND PROCEDURE"); 7AA FEDERAL PRACTICE AND PROCEDURE § 1785.1; 1 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 2:11 (5th ed. 2011) (hereinafter "NEWBERG ON CLASS ACTIONS").

In that prior to moving for certification of a class, there are no class certification costs invested, no other party has a concrete interest in the resolution of the action, and the prospect of obtaining representative status is entirely conjectural, ACA would urge the Court to find that a justiciable controversy no longer exists after an offer of judgment affording complete relief has been tendered. *Damasco v. Clearwire Corp.*, 662 F.3d 891, 896 (7th Cir. 2011).

A. Economic costs of litigation animate and limit offers of judgment.

Rule 68 and Rule 23 should be harmonized by giving effect to each according to their own terms, even if the result in a given case means Rule 23 will never be employed. The tension that arises between Rule 68 and Rule 23 in putative class actions is one of timing and economics: if the motion for class certification is filed before the offer of judgment, the issue of class certification has been joined and is in controversy, and a subsequent offer of judgment will not render the action moot. *Carroll v. United Compucred Collections, Inc.*, 399 F.3d 620, 625 (6th Cir. 2005). If the offer of judgment precedes a motion for class certification, the two rules can and should be read to allow a Defendant to short circuit the proceedings by making an offer to the putative class representative on an individual basis. If there are truly hundreds or thousands of others with like claims, surely one or more other willing representatives will heed the call to arms and file another action, and the economic weight of making successive offers will prevent abuse.

Consider, for example, a simple TCPA action, which Plaintiff claims a single violation of 47 U.S.C. § 227(b)(1)(B), for which the individual seeks recovery of $500 in federal court,[3] pursuant to 47 U.S.C.

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[3] *See Mims v. Arrow Financial Services, LLC*, 132 S.Ct. 740, 753 (2012).

§ 227(b)(3)(B).[4] The TCPA plaintiff has a justiciable controversy as long as the Court has within its power to grant recovery for $500. If the Defendant makes an offer of judgment for $500 at the outset of the action, it should readily appear that the controversy has evaporated because there is nothing remaining in dispute, erstwhile the Plaintiff is entitled to her judgment in the amount of $500. 13B FEDERAL PRACTICE AND PROCEDURE § 3533.2. If the TCPA Plaintiff also prayed for a cheeseburger and milkshake, it should not matter because the Court does not have the power to grant the additional relief requested. The case and the controversy are over.

Similarly, consider an FDCPA action, which provides for statutory fee shifting under 15 U.S.C. § 1692k(a)(3), and is among suits within the "largest categories of privately initiated federal court civil actions." *See* Harold S. Lewis, Jr. & Thomas A. Eaton, *The Contours of a New FRCP, Rule 68.1: A Proposed Two-Way Offer of Settlement Provision for Federal Fee-Shifting Cases*, 252 F.R.D. 551, at n. 11 (2009), citing Harold S. Lewis, Jr. & Thomas A. Eaton, *Rule 68 Offers of Judgment: The Practices and Opinions of Experienced Civil Rights and Employment Discrimination Attorneys*, 241 F.R.D. 332, 337 n. 20 (2007). Suppose further that litigating the case to final judgment will cost the Plaintiff $15,000 and cost the Defendant $20,000. Emery G. Lee III & Thomas E.

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[4] The statute also provides for trebling in the case the court finds the violation willful or knowing. 47 U.S.C. § 227(b)(3). It likewise provides for injunctive relief. 47 U.S.C. § 227(b)(3)(A).

Willging, *Defining The Problem Of Cost In Federal Civil Litigation*, 60 DUKE L.J. 765, 770 (2010). Most would agree that given the stakes in the case being what they are, spending 20 times the amount at risk to defend the case is not ordinarily justifiable. Further, the longer it takes to resolve the case, whether because of a vigorous prosecution or defense, the greater the potential fee award becomes. John R. Chiles, Alan D. Leeth, R. Frank Springfield, Zachary D. Miller, *Same Song, Different Year – Attorneys' Fees Still A Driving Force Behind Consumer Finance Litigation*, 62 CONSUMER FIN. L.Q. REP. 256, 257 (Fall-Winter 2008). After years of paying a few thousand to resolve handfuls of these suits, a defendant might want to defend a "nuisance suit" and draw a line in the sand; send a message that it isn't a pushover and would be willing to spend this kind of money to prove its innocence or engaged in no wrongdoing. Marie Gryphon, *Assessing The Effects Of A "Loser Pays" Rule On The American Legal System: An Economic Analysis And Proposal For Reform,* 8 RUTGERS J. L. & PUB. POL'Y 567, 577-78 (Spring 2011) (hereinafter "Gryphon, *Economic Analysis*"). At the same time, Plaintiff might seek to maximize attorneys fees before entertaining any settlement discussions, in order to reach the break-even threshold or maximize profits. Gryphon, *Economic Analysis,* 580. Defendant, on the other hand, is incentivized to make an offer of judgment "early in the litigation to provide maximum leverage." Harold S. Lewis, Jr., Thomas A. Eaton, *The Contours of a New FRCP, Rule 68.1: A Proposed Two-Way Offer of Settlement Provision for Federal Fee-Shifting Cases*, 252 F.R.D. 551, at n. 25.

Rule 68 contains a self-limiting economic principle that should be allowed to operate according to its terms, and Rule 68 should not be trumped or negated by Rule 23. For example, the FDCPA limits defendants' potential liability to participating class members to "the lesser of $500,000 or 1 per centum of the [defendant's] net worth." 15 U.S.C. § 1692k(a)(2)(B). If the first of several FDCPA Plaintiffs is paid $1,000, his costs and reasonable fees and his claim is rendered moot, successive suits involving the same claim filed against the same defendant would deter the Defendant from making similar offers seriatim, because it would cost the defendants more to continue to "pick off" putative representatives than it would to lose on class and on the merits. Consider for instance, the *Jerman* class. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich*, 271 F.R.D. 572 (N.D. Ohio 2010) (on remand from *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S.Ct. 1605, 176 L.Ed.2d 519 (2010)) (certifying a class where the maximum potential recovery was shown to be $3.10 for 4,211 class members).[5] If 4,211 people lined up to sue, and

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[5] In subsequent proceedings, the district court found that no 'additional damages' were warranted. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich*, No. 1:06-cv-01397, 2011 WL 1434679, *11 (N.D.Ohio Apr. 14, 2011). Undaunted, the Plaintiff's attorneys sought an award of attorney's fees of $343,411.79. N.D. Ohio Case No. 1:06-cv-01397, doc. no. 62-1, PageID 473, https://ecf.ohnd.uscourts.gov/doc1/14115543811 (last visited 8/27/12). An appeal was filed, and the parties settled with the appeal pending. Under the terms of the settlement, 3,893 Class Members received their pro rata share of 1% of the

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the defendant sought to buy them off one by one, the Defendant would have to pay a minimum of $4,211,000 to resolve all the cases (4,211 x $1,000), instead of $13,052.25 (1% of net worth). After paying 10 people $1,000 each, plus costs and fees, the folly of this approach would lead the *defendant* to seek consolidation and class certification of all claims. Even in other higher-stakes contexts "picking off" putative representatives one after another would obviously be cost-prohibitive and otherwise impractical.

Defendants will elect to forgo the opportunity to make an offer of judgment in many cases, because class actions provide an incentive for the defendant to have all claims resolved together. 1 MCLAUGHLIN ON CLASS ACTIONS § 3:3. Creating a rule that flatly prohibits Defendants from evaluating the economic risk associated with one or many lawsuits, and delaying implementation of that choice until after class certification has been sought, promotes waste. The argument that giving effect to an offer of judgment in this context would permit Defendants to manipulate, opt out of class actions or game the system, applies in like fashion to Plaintiffs. Plaintiffs will be rewarded for gaming the system and opting out of the operation

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Defendants' net worth of $13,052.25, which equaled $3.35 per person. N.D. Ohio Case No. 1:06-cv-01397, doc. no. 91, https://ecf.ohnd.uscourts.gov/doc1/14116110684 (last visited 8/27/12). The attorneys received the lion's share of the $160,000.00 settlement fund, although Plaintiff did bear the costs of class administration.

of Rule 68 offers of judgment by filing disingenuous class allegations in every lawsuit, incentivizing Plaintiffs to maximize their time and costs seeking class certification, even on marginal claims. When only an individual claim remains possible because class certification has been sought and lost, for the offer to provide complete relief, Defendants will be required to offer to pay for all costs and reasonable attorneys fees to moot the remaining claims. Requiring the Defendant to pay for a failed class certification effort only rewards "attorneys as the only real parties in interest and virtually the only private individuals who stand to benefit financially from . . . prosecution of the action." Martin H. Redish, *Class Actions And The Democratic Difficulty: Rethinking The Intersection Of Private Litigation And Public Goals,* 2003 U. CHI. LEGAL F. 71, conclusion (2003).

Requiring the action be artificially kept alive to permit class discovery, class certification motion practice, and appeals, after mooting the individual's claim needlessly increases the cost and length of litigation.

If the Defendant elects to make an offer of judgment early in the litigation for the maximum statutory damages, costs, and reasonable fees, it accomplishes four things. First, it forces Plaintiff to make an assessment of the relative strength of the merits. *Marek v. Chesny*, 473 U.S. 1, 10-11 (1985). Second, it puts the post-offer costs at risk. FED. R. CIV. P. 68(d).

Third, it puts post-offer fees in jeopardy[6] if the court finds the time spent post offer was not reasonable or amounts to waste. *Lee v. Thomas & Thomas*, 109 F.3d 302, 306-07 (6th Cir. 1997). Fourth, and most important, it renders the action moot because there is nothing remaining in controversy. *Marschall v. Recovery Solution Specialists, Inc.*, 399 Fed.Appx. 186, 187-88, 2010 WL 3937992, *1 (9th Cir. 2010); *Thomas v. Law Firm of Simpson & Cybak*, 244 Fed.Appx. 741, 744, 2007 WL 2126270, *2 (7th Cir. 2007).

B. The individual interests at stake in putative class actions can be satisfied before class certification.

Should the hypothetical TCPA Plaintiff above, after settling her individual claim, later experience an epiphany by imagining a representative claim that she might have pursued, any desire to promote the interests of others would nevertheless be too remote, hypothetical, or conjectural and come too late into the proceedings, to keep the controversy alive. *Alvarez v. Smith*, 558 U.S. 87, 130 S.Ct. 576, 580-81 (2009) ("a dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm, falls outside the scope of the constitutional words 'Cases' and 'Controversies.'"); *Muro v. Target Corp.*, 580 F.3d

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[6] Because 15 U.S.C. § 1692k(a)(3) does not contain language indicating fees are part of the costs, post-offer fees are not automatically cut-off. *Marek v. Chesny* 473 U.S. 1, 43-45 (Brennan, J., dissenting).

485, 491 (7th Cir. 2009) ("An abstract interest in a matter never has been considered a sufficient basis for the maintenance of – or the continuation of – litigation in the federal courts.").

In the context of putative class actions, there is considerable uncertainty whether the action is rendered moot before a class action is certified, in part, because prior to 2003, it was thought that the filing of a putative class action complaint alone somehow injected the interests of unnamed class members into the action. *See McDowall v. Cogan*, 216 F.R.D. 46, 50 (E.D.N.Y. 2003) (construing pre-amendment Rule 23(e) in support of the proposition that the "adverse party" for the purposes of settlement to be the putative class itself, not merely the named plaintiff). FED. R. CIV. P. 23(e) was amended in 2003 to make clear that judicial approval of any settlement of a putative class action only applies to a "certified class." *See* Fed. R. Civ. P. 23(e), Advisory Committee Notes to 2003 Amendment. 1 NEWBERG ON CLASS ACTIONS § 1:1; 2 MCLAUGHLIN ON CLASS ACTIONS § 6:1. The Amendment was intended to make clear that before certification, there is no "class" to protect. *Committee on Rules of Practice and Procedure, Report of the Civil Rules Advisory Committee* (May 20, 2002), *reprinted in* 215 F.R.D. 158, 203, 209-10, 220, 242-43 (2003). "[S]ettlements or voluntary dismissals that occur before class certifications are outside the scope of [Rule 23]." *Buller v. Owner Operator Indep. Driver Risk Retention Group, Inc.*, 461 F.Supp.2d 757, 764 (S.D. Ill.

2006) (quoting 7B FEDERAL PRACTICE AND PROCEDURE § 1797).

If at the outset of the hypothetical TCPA action, the Plaintiff had filed suit seeking not only her $500, but also sought to represent the interests of similarly situated recipients of like calls made by the Defendant, until the Court has certified a class, and before a motion for class certification has been filed, an offer of judgment affording her a judgment in the amount of $500 moots the action. *Damasco v. Clearwire Corp.*, 662 F.3d 891, 896. In such a case, not only are the interests of the TCPA Plaintiff moot, but the entire action is also moot, because there is no other Article III interest at stake prior to certification of a class. *Board of School Commissioners v. Jacobs*, 420 U.S. 128, 130. "Federal Rule 23 determines what is and is not a class action in federal court. . . . [A] 'properly conducted class action,' with binding effect on nonparties, can come about in federal courts in just one way – through the procedure set out in Rule 23." *Smith v. Bayer Corp.*, 131 S.Ct. 2368, 2380. Whether or not class certification is attainable, the Plaintiff stands to recover nothing more than the $500 already obtained. If this means the Defendant will face a series of repetitive lawsuits where each new Plaintiff tries her luck at obtaining certification before being given a judgment of $500, then relitigation and successive suits are mere byproducts of the systemic design already in place that cannot be avoided by the creation of de facto class actions by the fiction of nascent or indivisible classes. *Id.* at 2380-81.

C. The Third Circuit's expansion of the inherently transitory exception to mootness to all class and representative actions is misguided.

Many Courts have held the pendency of a motion for class certification made at the time of the offer of judgment to the individual plaintiff avoids mooting the action. Romualdo P. Eclavea, Annotation, *Mootness of class representative's claim pending litigation as precluding maintenance of class action under Rule 23 of Federal Rules of Civil Procedure, as amended in 1966*, 33 A.L.R. FED. 484 (1977 & SUPP.); 1 NEWBERG ON CLASS ACTIONS § 2:9; 1 MCLAUGHLIN ON CLASS ACTIONS § 4:28 (8th ed.).

Notably, the Third Circuit first rejected this approach, and applied the inherently transitory exception to mootness in *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004). In *Weiss*, the Third Circuit observed that FDCPA class actions are susceptible to being mooted by offers of judgment, and that the putative class representative is acutely susceptible to being picked off by an offer of judgment. *Weiss v. Regal Collections*, 385 F.3d 337. 345. The Third Circuit extended the application of this exception to FLSA representative actions in *Symczyk v. Genesis HealthCare Corp.*, 656 F.3d 189, 195 (3d Cir. 2011). ACA offers the following analysis of the Third Circuit decision in *Weiss* to show that *Symczyk v. Genesis HealthCare Corp.* was wrongly decided. *See* generally Daniel A. Zariski, et al., *Mootness In The Class Action Context: Court-Created Exceptions To*

The "Case Or Controversy" Requirement Of Article III. 26 REV. LITIG. 77, 109-10 (Winter 2007).

In *Weiss v. Regal Collections*, the Third Circuit evaluated a putative FDCPA class action, finding that a pre-certification offer of judgment completely satisfied the individual's FDCPA claims. *Weiss v. Regal Collections*, 385 F.3d 337, 340-42, 344. The Court went on to hold, however, the action was not moot, because in the Court's view, "picking off" a named plaintiff in the context of putative FDCPA class litigation undercut the "viability of the class action procedure. . ." *Weiss v. Regal Collections*, 385 F.3d 337, 344-45. Recognizing that this Court had never addressed the issue directly, the Court drew on the inherently transitory exception to mootness and the relation back doctrine to find the filing of a class action complaint makes the Plaintiff a part of an indivisible class before class certification has been sought. *Weiss v. Regal Collections*, 385 F.3d at 342-47. Further, recognizing that the relation back doctrine had only been employed when a motion for class certification was pending, the Court nonetheless found the rationale for looking to the pendency of a motion for class certification not "well-founded," and the "class action process should be able to 'play out' according to the directives of Rule 23. . . ." *Weiss*, 385 F.3d at 347-48. In that the Plaintiff had not filed a motion for class certification at the time the case was dismissed, and likewise finding no "undue delay," the Court went further to direct the district court to allow time for discovery and to allow the Plaintiff to file a

motion for class certification. *Id.* at 348. This logic has been followed by other circuits, and rejected most recently by the Seventh Circuit in *Damasco v. Clearwire Corp.*, 662 F.3d 891 (rejecting *Weiss*); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1242 (10th Cir. 2011) (following *Weiss*); *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011) (same).

The Third Circuit's decision in *Weiss* cannot be reconciled with this Court's expositions on the inherently transitory exception to mootness; the decision promotes Rule 23 at the expense of Rule 68, needlessly increasing the cost and length of litigation, and the reasons advanced do not support a distinct "class action exception" to mootness doctrine.

In *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991), this Court, addressing a Section 1983 claim based on failing to provide "prompt" judicial determinations of probable cause, observed that "[s]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires. . . . In such cases, the 'relation back' doctrine is properly invoked to preserve the merits of the class claim for judicial resolution." *County of Riverside v. McLaughlin*, 500 U.S. 44, 52. The qualifying description of the application of the inherently transitory exception doctrine to "some claims" appears to have been lost on the Third Circuit, because it has treated "all claims" filed as class or representative actions as

fitting the bill. In order for a claim to be "inherently transitory," the claim must satisfy two requirements: "(1) it is uncertain that a claim will remain live for any individual who could be named as a plaintiff long enough for a court to certify the class; and (2) there will be a constant class of persons suffering the deprivation complained of in the complaint." *Olson v. Brown*, 594 F.3d 577, 582 (7th Cir. 2010) (construing *Gerstein v. Pugh*, 420 U.S. 103, 110 n. 11 (1975)). *See also, e.g., Sze v. I.N.S.*, 153 F.3d 1005, 1010 (9th Cir. 1998); *Wade v. Kirkland*, 118 F.3d 667, 670 (9th Cir. 1997) (an inherently transitory claim focuses on the "claims of the class as a whole" and is one where "there is a constantly changing putative class"); *Cruz v. Farquharson*, 252 F.3d 530, 534-35 (1st Cir. 2001); *Robidoux v. Celani*, 987 F.2d 931, 939 (2d Cir. 1993); *Lusardi v. Xerox Corp.*, 975 F.2d 964, 983 (3d Cir. 1992); *Rocky v. King*, 900 F.2d 864, 870 71 (5th Cir. 1990).

A putative class action seeking recovery of statutory damages under the FDCPA does not fit this paradigm because each individual possesses a claim that expires when the statute of limitations runs, and the putative FDCPA class is defined retrospectively, not prospectively.[7]

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[7] Nor is an offer of judgment akin to voluntary cessation, which likewise provides an exception to mootness. 13C FEDERAL PRACTICE AND PROCEDURE § 3533.5. Under the voluntary cessation doctrine, a dispute over the legality of the challenged practices continues to present a live controversy despite voluntary

(Continued on following page)

D. There is no "nascent" or "indivisible" interest at stake before a motion for class certification has been filed.

Every individual action has the potential to become a class action, and every putative class action has the potential to become an individual action, because complaints can be amended throughout an action. FED. R. CIV. P. 15. Putative class actions are treated as individual actions before certification in almost every other context and for most other purposes. 7B FEDERAL PRACTICE AND PROCEDURE §§ 1795, 1798.[8] There is no basis for finding that before ever seeking certification, the Plaintiff is part of an "indivisible class" or has a distinct "nascent interest" in class

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cessation of a challenged practice, unless it is shown there is no realistic expectation the practice will recur. *Los Angeles County v. Davis*, 440 U.S. 625, 631-32 (1979). While it may be true of actions seeking prospective relief to compel a defendant to comply with legal requirements, when no declaratory or injunctive relief is in issue, and only claims seeking monetary damages, future compliance with legal requirements, and the voluntary cessation doctrine are irrelevant. *Goldenberg v. Indel, Inc.*, No. 09-5202, 2012 WL 2466567, *4 (D.N.J. June 27, 2012). *See also Alvarez v. Smith*, 588 U.S. 87, 130 S.Ct. 576, 581 (mootness exception for "capable of repetition yet evading review" inapplicable to actions for damages).

[8] In *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 551 (1974), this Court held the statute of limitations was tolled as to absent members of the claimed class until a decision was had on class certification, using language suggesting absent members were 'parties.' In *Smith v. Bayer Corp.*, 131 S.Ct. 2368, 2380, n. 10, the Court rejected the notion that *American Pipe* meant absent members of a claimed class that was not certified were 'parties' for purposes of preclusion.

relief. *Symczyk v. Genesis HealthCare Corp.*, 656 F.3d 189, 196; *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1249. The *Lucero* Court found that "a nascent interest attaches to the proposed class upon the filing of a class complaint such that a rejected offer of judgment for statutory damages and costs made to a named plaintiff does not render the case moot under Article III." *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1249. Yet, this "nascent interest" concept finds no support in this Court's Article III precedent, nor in Rule 23. If every named plaintiff in a putative class action were treated as part of an non-participating, uninvolved and absent class, whose legal and economic interests were at stake from the inception of the action, without ever filing for class certification, then every individual action is also analytically indistinguishable from a certified class.

The lens through which the existence of a "controversy" is assessed, is that of the parties to the action. Absent intervention, class certification or substitution, the only parties to the action are the Plaintiff and the Defendant. The Plaintiff's interest in representing a class before certification is sought, is remote, hypothetical and conjectural, much as it is before the filing of the action. "Where on the face of the record it appears that the only concrete interest in the controversy has terminated, reasonable caution is needed to be sure that mooted litigation is not pressed forward, and unnecessary judicial pronouncements on even constitutional issues obtained,

solely in order to obtain reimbursement of sunk costs." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990).

Prior to filing the motion for class certification, the prospect of having the interests of others adjudicated in the proceedings is entirely remote, hypothetical, and conjectural. Bystanders who do not participate in the action have no flesh in the game, have nothing to gain or lose, and are not bound by the outcome. Until the point in time in the proceedings when the interests of others are joined to the proceedings, or there has been a procedural ruling on class certification warranting appellate review, putative class complaints do not warrant any distinguishable treatment, and no Rule 23 exception should be read into Rule 68. It is only when the personal stake in securing appellate review of the procedural ruling "exist[s] with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired," that "the right to have a class certified" is a sufficient personal stake to keep the action alive. *U.S. Parole Commission v. Geraghty,* 445 U.S. 388, 403-04 (1980).

Thus, if there was never any motion filed to intervene, to substitute, to certify a class, prior to mooting of the individual's claims, the case and controversy is over.

CONCLUSION

For the foregoing reasons, and those set forth in Petitioner's brief, the decision of the Third Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORP.,
Petitioners,
v.
LAURA SYMCZYK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 56 national and international labor organizations with a total membership of approximately 12 million working men and women.[1] This case concerns the collective action provision of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, which permits suits by "any one or more employees for and in behalf of himself or themselves and other employees similarly situated," § 216(b), and the Constitution's case or controversy requirement as it relates to such collective actions. Because a central purpose of the FLSA is to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" on the basis that such conditions "constitute[] an unfair method of competition," § 202(a), the AFL-CIO has a strong interest in the proper interpretation of the FLSA, as well as a correct understanding of the case and controversy requirement as it bears on effective enforcement of

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[1] Counsel for the petitioners and counsel for the respondent have filed letters with the Court consenting to the filing of *amicus* briefs on either side. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

basic workplace rights. For these reasons, the AFL-CIO has routinely filed *amicus* briefs in this Court in cases concerning the proper interpretation of the FLSA and its implementing regulations. *See, e.g.*, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007); *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005).

STATEMENT

The Fair Labor Standards Act requires employers to pay covered employees at least the statutory minimum wage, 29 U.S.C. § 206(a), and a statutory overtime rate of "not less than one and one-half times the regular rate" for hours worked in excess of forty hours in a workweek, § 207(a)(1). The Act permits suits by "any one or more employees for and in behalf of himself or themselves and other employees similarly situated." § 216(b). An individual becomes "a party plaintiff to . . . such action" by "giv[ing] his consent in writing to become such a party and such consent is filed in the court in which such action is brought." *Ibid.*

Laura Symczyk, the plaintiff in this case, was employed by Genesis Healthcare Corporation and Eldercare Resources Corporation (collectively, the "defendants") as a Registered Nurse in a health care facility in Philadelphia in 2007. JA 23.

On December 3, 2009, Symczyk filed a class action complaint against defendants in state court in Pennsylvania alleging that defendants violated the Pennsylvania Minimum Wage Act and Pennsylvania Wage Payment and Collection Law by failing to pay

Symczyk and similarly situated employees at defendants' facilities throughout Pennsylvania for statutory overtime wages and wages due for hours worked during meal breaks pursuant to defendants' "Meal Break Deduction Policy." *Symczyk v. Genesis Healthcare Corp.*, Case No. 2:10-cv-01378, docket #1, Exhibit B (state class action complaint) (E.D. Pa.). According to Symczyk's allegations, that policy resulted in an automatic deduction of a 30-minute meal period for every shift worked, without regard to whether an employee actually worked during his or her meal period. *Ibid.*

The next day, Symczyk filed a lawsuit in federal court in the Eastern District of Pennsylvania, alleging that these same facts violated the FLSA by denying the payment of statutory overtime wages. JA 21-31. Symczyk filed her federal complaint as a collective action on behalf of all "similarly situated" workers employed by defendants in Pennsylvania. JA 26-29.

On February 18, 2010, defendants answered Symczyk's federal complaint. JA 44-54. In its answer, defendants denied liability but did not plead as an affirmative defense that the district court lacked subject matter jurisdiction over the case due to the absence of a live case or controversy. *Ibid.*

On the same day, defendants sent Symczyk a Rule 68 offer of judgment for all claims asserted in the federal suit. JA 80-82. In a cover letter, defendants stated that, "[i]n accordance with Federal Rule of Civil Procedure 68, if Plaintiff has not accepted this Offer of Judgment in writing within ten (10) days after service, this Offer of Judgment shall be deemed with-

drawn."[2] JA 79. The letter also stated that "if Plaintiff obtains a final judgment in this matter that is less favorable than this Offer, Genesis will seek to recover all reasonable costs (potentially defined to include fees under the FLSA) incurred after it made this Offer." *Ibid.*

Symczyk did not accept the offer of judgment. As a result, the offer expired, at the latest, on March 4.

In the meantime, on February 22, the district court issued a notice of a Rule 16 pretrial conference in the case. JA 2, docket # 9. Attached to that notice was a notice to counsel concerning the district court judge's pretrial and trial procedures which stated that "[m]otions to dismiss . . . should be filed, whenever possible, before the Preliminary Pretrial Conference," *Symczyk v. Genesis Healthcare Corp.*, Case No. 2:09-cv-05782, docket #9, Supplement #2, at p. 1 (E.D. Pa.), and that the parties were required to inform the court of any "jurisdictional defects" prior to the conference, *id.* at p. 2. On March 8, the district court convened the pretrial conference and issued a scheduling order permitting the parties ninety days for initial discovery "at the close of which Plaintiff will move for conditional certification under § 216(b) of the FLSA." JA 62-63. The scheduling order makes no mention of any jurisdictional defect in the case or

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[2] The offer itself stated that it would "remain open until it expires by operation of law, unless otherwise withdrawn by Defendants." JA 81. Thus, despite the reference to 10 days in the cover letter, the apparent intent of the defendants was that the offer would remain open for the 14-day period specified in Rule 68 as amended effective December 1, 2009.

any plan by defendants to file a motion to dismiss, *ibid.*, and the district court later stated that it "was unaware when it issued the Scheduling Order that Defendants had already made Symczyk a Rule 68 offer of judgment," App. 43.

On March 23, 2010, two weeks into the class certification discovery period, defendants filed a motion to dismiss Symczyk's federal suit, attaching their unaccepted offer of judgment to the motion. JA 64-82. In the motion, defendants stated that: "Even though Defendants' Offer to Ms. Symczyk afforded her all relief she seeks and could obtain in this matter, she never responded, effectively rejecting the Offer. Consequently, Ms. Symczyk no longer has a personal stake or legally cognizable interest in the outcome of this action, a prerequisite to this Court's subject matter jurisdiction under Article III of the United States Constitution." JA 65 (citation omitted).

On March 29, 2010, while class certification discovery continued and the motion to dismiss was still pending, defendants removed Symczyk's state law class action suit to federal court in the Eastern District of Pennsylvania. *See Symczyk v. Genesis Healthcare Corp.*, Case No. 2:10-cv-01378, docket #1. In their notice of removal, defendants claimed that "the State Action is a civil action over which th[e] Court has original federal question jurisdiction under 28 U.S.C. § 1331." *Id.*, docket #1, Notice of Removal, p. 5. Defendants explained that "[m]any of the individuals in the purported class are or were members of a union and subject to one of at least six (6) collective bargaining agreements ('CBAs')" "thus bringing the State Action Complaint under the auspices of §

301 of the L[abor] M[anagement] R[elations] A[ct][, 29 U.S.C. § 185]." *Id.* at pp. 6-7. Although Defendants' notice of removal stated that Symczyk's state case concerned "the exact same facts and conduct" as her FLSA suit, *id.* at p.2 , the district court docketed the removed state law case under a new case number rather than consolidate it with the pending FLSA suit.

On April 13, 2010, while the motion to dismiss in the FLSA case remained pending, the district court entered a Stipulated Order in which Symczyk agreed to voluntarily dismiss without prejudice her removed state law suit and Defendants agreed to permit Symczyk to amend her complaint in the FLSA suit to add her state law class action claims. JA 88-89. The Stipulated Order stated, without explanation, that "[t]he filing of the Amended Complaint will not moot or otherwise affect the Court's consideration or determination of Defendant's [sic] pending Motion to Dismiss." JA 89. On April 23, 2010, Symczyk filed the First Amended Class/Collective Action Complaint, JA 115-133, which pleaded "the Pennsylvania state law claims as a class action pursuant to Rules 23(a) and (b) of the Federal Rules of Civil Procedure," JA 116.

In response to Symczyk's filing of the First Amended Complaint, Defendants did not withdraw, amend, or re-file its motion to dismiss. Moreover, in its reply memorandum in support of its motion to dismiss – filed a week after Symczyk filed her First Amended Class/Collective Action Complaint including the Rule 23 claims – Defendants argued without explanation that "Rule 23 does not apply to this

case," JA 135, even though Rule 23 did apply to the state claims.

On May 19, 2010, the district court "tentatively" granted Defendants' motion to dismiss. Pet. App 43. The district court explained that it had "tentatively concluded that Defendants' Rule 68 offer of judgment moots this collective action, and thus, that this collective action should be dismissed for lack of subject matter jurisdiction." *Ibid.* The Court added that it "would likely decline, in its discretion, to exercise supplemental jurisdiction over Symczyk's claims under Pennsylvania law." *Ibid.* The Court did not mention Defendants' prior claim that Symczyk's state law claims constituted "a civil action over which th[e] Court has original federal question jurisdiction under 28 U.S.C. § 1331" – the basis for the removal of this claim by Defendants to federal court. *Symczyk v. Genesis Healthcare Corp.*, Case No. 2:10-cv-01378, docket #1, p. 5. The Court subsequently made its tentative conclusions final, dismissing Symczyk's FLSA claim with prejudice as moot and remanding Symczyk's state law claims to state court.[3] Pet. App. 45-46.

Symczyk appealed the district court's dismissal of the FLSA claim to the Third Circuit. The court of appeals did not question the district court's conclusion that Defendants' unaccepted Rule 68 Offer of Judgment would moot Symczyk's claim but for the fact that Symczyk filed her original FLSA suit as a

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[3] After the district court indicated its tentative decision to dismiss Symczyk's FLSA claim, Symczyk did not oppose the remand of her state claims back to state court. JA 175-76.

collective action.[4] Instead, the Third Circuit reversed the district court on the ground that "[t]he considerations that caution against allowing a defendant's use of Rule 68 to impede the advancement of a representative action [in the Rule 23 setting]" are "equally weighty" in the context of an FLSA collective action. Pet. App. 25. On that basis, the court of appeals held that "[a]bsent undue delay, when an FLSA plaintiff moves for 'certification' of a collective action, the appropriate course – particularly when a defendant makes a Rule 68 offer to the plaintiff that would have the possible effect of mooting the claim for collective relief asserted under § 216(b) – is for the trial court to relate the motion back to the filing of the initial complaint" such that if "at least one other similarly situated employee opts in, then . . . the proffered rationale behind dismissing the complaint on jurisdictional grounds would no longer be applicable." Pet. App. 28-29.

Defendants then filed a petition for a writ of certiorari, which this Court granted.

SUMMARY OF ARGUMENT

This Court cannot reach the merits of this case without first deciding a logically prior issue not decided by the court of appeals or argued by the defendants: whether an unaccepted Rule 68 offer of

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[4] Indeed, the Third Circuit stated that, on remand, "[i]f . . . the court finds Symczyk's motion to certify would be untimely, or otherwise denies the motion on its merits, then defendants' Rule 68 offer to Symczyk – in full satisfaction of her individual claim – would moot the action." Pet. App. 29.

judgment deprives a federal court of subject matter jurisdiction, even in a purely individual action, by rendering the plaintiff's claim moot. By the express terms of Rule 68 itself, an offer of judgment that is not accepted by the plaintiff – such as the offer at issue in this case – is considered withdrawn. At that point, the plaintiff stands in precisely the same position vis-à-vis the defendant with regards to damages as she did before the offer of judgment was made. A plaintiff who does not accept a Rule 68 offer of judgment, therefore, retains a concrete interest in the outcome of the case and thus the case is not moot. Because the plaintiff in this case did not accept defendants' Rule 68 offer of judgment, her claim remains a live one.

A defendant *can* attempt to moot an individual plaintiff's claim by unconditionally tendering the amount claimed by the plaintiff directly to the plaintiff or by depositing that same amount with the court. To the extent that such a tender indisputably satisfies the plaintiff's claim, such an unconditional tender would moot at least that individual plaintiff's interest in the case.

Notably, the defendants in this case did not make an unconditional tender to the plaintiff, but instead made a Rule 68 offer of judgment conditioned upon termination of the plaintiff's suit. Thus, whether an unconditional tender to the plaintiff in this case – a case pleaded as an FLSA collective action – would have mooted the case in its entirety is a question not presented here.

There can be no doubt, however, that in a case where such an unconditional tender was made, a dis-

trict court could stay any decision on a defendant's motion to dismiss for lack of subject matter jurisdiction until similarly situated employees are given notice of the pending FLSA lawsuit and a reasonable opportunity to opt in. Any other approach would allow defendants to strategically use moot-and-dismiss tactics to delay, if not prevent, notice being provided to potential party plaintiffs, bleeding value from such plaintiffs' claims as the statute of limitations continues to run and preventing many such claims from ever being filed. Such a rule would undermine Congress' statutory purpose to permit employees to join together in collective actions in order effectively to enforce the requirements of the FLSA and "eliminate" "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202.

ARGUMENT

The question presented by the petition for certiorari in this case is "[w]hether a case becomes moot . . . when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff's claims." Pet. i. In arguing that this case is moot, the defendants take as a given that the offer they made to the plaintiff mooted her own claim – an argument accepted by the court of appeals – and concentrate on whether the case is nevertheless kept alive by the claims of the "others similarly situated" asserted by the plaintiff's complaint.

We begin by demonstrating that it is beyond dispute that the offer on which the defendants rely did *not* moot even the plaintiff's own claim. That being

so, this case is clearly *not* moot and this Court need not reach the logically subsequent question discussed at length by the defendants in their brief and by the court of appeals below.

Although the plaintiff in this case did not contest before the court of appeals the district court's conclusion that an unaccepted offer of judgment could moot her individual claim, this Court should either resolve that logically prior question or dismiss this case as improvidently granted. If the Court were to reach out to resolve the logically subsequent question presented by the petition in this case without first definitively resolving the preliminary issue of subject matter jurisdiction, it would only further exacerbate the present state of confusion in the lower courts regarding whether an unaccepted Rule 68 offer can moot a claim. *Compare Poteete v. Capital Eng'g, Inc.*, 185 F.3d 804, 807 (7th Cir. 1999) (unaccepted Rule 68 offer does not moot claim), *with Weiss v. Regal Collections*, 385 F.3d 337, 340 (3d Cir. 2004) (unaccepted Rule 68 offer does moot claim), *with O'Brien v. Ed Donnelly Enters.*, 575 F.3d 567, 575 (6th Cir. 2009) (where plaintiff rejects Rule 68 offer, court should nevertheless enter judgment in favor of plaintiff based on that offer).

I. THE DEFENDANTS' EXPIRED OFFER OF JUDGMENT DID NOT MOOT THE PLAINTIFF'S OWN CLAIM FOR BACK WAGES.

The district court in this case entered an order providing that the "Plaintiff's FLSA claim is dismissed with prejudice," Pet. App. 45, based on the court's prior conclusion "that an offer of settlement under

Rule 68, if undoubtedly sufficient to compensate the plaintiff for all damages, will result in dismissal for lack of jurisdiction, regardless of whether the offer is accepted," Pet. App. 35. The district court's dismissal of the plaintiff's FLSA claim based on a withdrawn Rule 68 offer of judgment was contrary to the express terms of Rule 68 itself and to the established law regarding what is required for a tender of payment to moot a claim for money damages.

A. Rule 68 provides that, if the plaintiff "serves written notice accepting the offer, either party may then file the offer and notice of acceptance" and "[t]he clerk must then enter judgment." Fed. R. Civ. P. 68(a). "An unaccepted offer is considered withdrawn . . . ." Fed. R. Civ. P. 68(b). "Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs." *Ibid.* The only consequence of failure to accept an offer of judgment is that "[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made." Fed. R. Civ. P. 68(c). As this Court has explained, "[i]f a plaintiff chooses to reject a reasonable offer," "he [is] not [] allowed to shift the cost of continuing the litigation to the defendant in the event that his gamble produces an award that is less than or equal to the amount offered." *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 356 (1981). But nothing in *Delta Air Lines* or this Court's other precedent suggests that a court can prohibit a plaintiff from taking such a "gamble" at all based on an unaccepted Rule 68 offer of judgment.

The district court quite properly did *not* treat the

offer of judgment as accepted and thus did *not* enter judgment in the plaintiff's favor. Rather, in direct contravention of the terms of Rule 68(b), the district court took into evidence the unaccepted offer. And, having determined that the offer exceeded the amount the plaintiff could expect to recover, the district court entered judgment *in favor of the defendants* dismissing the plaintiff's FLSA claim with prejudice.

There is nothing in Rule 68 that allows a district court to enter judgment for the defendants based on an unaccepted offer of judgment. To the contrary, the Rule expressly states that the district court is not permitted to even receive evidence of the unaccepted offer "except in a proceeding to determine costs," that is, until after the case is complete and judgment has been entered. Fed. R. Civ. P. 68(b). And, the sole consequence stated in the Rule for failure to accept an offer of judgment is that "the costs incurred after the offer was made" will be shifted to the plaintiff if "the judgment that the [plaintiff] obtains is not more favorable than the unaccepted offer." Fed. R. Civ. P. 68(d). Thus, the actions of the district court were directly contrary to the terms of Rule 68.

B. "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party. As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox v. Service Employees International Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (citations, quotation marks and brackets omitted). At the point the district court dismissed this case as moot, the named plaintiff had

recovered nothing on her FLSA claim, and that remains so to this day. Thus, the plaintiff most certainly had "a concrete interest . . . in the outcome of th[is] litigation," and it was most certainly "[]possible for [the] court to grant . . . effectual relief" were she to prevail. *Ibid.* In short, it is impossible "to see how the plaintiff's claim could become moot if he does not receive any relief." *MacKenzie v. Kindred Hospitals East, LLC*, 276 F. Supp. 2d 1211, 1219 (M.D. Fla. 2003).[5]

"[I]f the defendants wanted to eliminate the issue of the plaintiff's entitlement to [FLSA overtime wages], they went about it in the wrong way. Instead of simply writing h[er] a check, with no strings attached, which would have eliminated the district court's jurisdiction over [the] claim . . . (the claim

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[5] In attempt to avoid this conundrum, the magistrate judge in *MacKenzie* recommended "that the defendant's motion to dismiss [for mootness] be granted to the extent that judgment is entered in favor of the plaintiff in the amount" specified in the defendant's unaccepted Rule 68 offer of judgment. *Ibid.* The Sixth Circuit has agreed that in these circumstances "the better approach is to enter judgment in favor of the plaintiffs in accordance with the defendants' Rule 68 offer of judgment." *O'Brien*, 575 F.3d at 575. As the Seventh Circuit has observed, this procedure seems highly "irregular." *Poteete*, 185 F.3d at 806.

In any event, entering judgment for the plaintiff is the opposite of dismissing her claim as moot. As the Second Circuit has observed, "[t]he entry of that judgment, remedying the grievance alleged in the [complaint], may have accorded the plaintiff sufficient relief, but it did not render th[e] cause[] of action moot," and it is "error, after granting such relief, to dismiss the . . . cause[] of action as moot." *Alan Guttmacher Institute v. McPherson*, 805 F.2d 1088, 1094 (2d Cir. 1986).

having been fully honored), they conditioned their offer to pay" by making "an offer of settlement," i.e. "a genuine offer of judgment under Rule 68." *Poteete*, 185 F.3d at 807 (citation omitted). In other words, if the defendants wanted to moot the plaintiff's own claim, they should have made an unconditional tender of the amount she was claiming from them and not a Rule 68 offer of judgment. *See Evans v. General Mechanical Corp.*, No. 6:12-cv-229, 2012 U.S. Dist. LEXIS 57715, *2 (M.D. Fla. April 25, 2012) ("FLSA claims are frequently mooted where an employer/defendant tenders 'full payment.'").[6]

"Tender is an offer to perform a condition or obligation coupled with the present ability of immediate performance, so that were it not for the refusal of cooperation by the party to whom tender is made the

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[6] Alternatively, defendants could have "confess[ed] to having violated the law," "default[ing] and suffer[ing] judgment to be entered against [them]." *Chathas v. Local 134 IBEW*, 233 F.3d 508, 512 (7th Cir. 2000). Like a tender that fully satisfies the plaintiff's claims, where "the defendant has . . . thrown in the towel there is nothing left for the district court to do except enter judgment." *Ibid. Accord McCauley v. Trans Union, LLC*, 402 F.3d 340, 342 (2d Cir. 2005) (stating that a default judgment "would remove any live controversy from th[e] case and render it moot"). Prior to entering a default judgment, the district court "may conduct hearings" to "establish the truth of any allegation by evidence[] or investigate any other matter." Fed. R. Civ. P. 55(b)(2). Where the complaint contains adequate allegations of "other employees similarly situated" to the named plaintiff, the district court should conduct such hearings as are necessary to ensure that the default judgment will not adversely affect the ability of such employees to become "a party plaintiff," 29 U.S.C. § 216(b).

condition or obligation would be immediately satisfied." *Cook v. Talbert*, 216 Ark. 370, 373 (1950) (citation and quotation marks omitted). A proper tender moots a legal claim for a sum of money, because "[a]ny obligation of the defendant to pay to the [plaintiff] the sums sued for . . . has been extinguished by the offer to pay all these sums, and the deposit of the money in a bank [or with the court] which . . . ha[s] the same effect as actual payment and receipt of the money." *California v. San Pablo & T.R. Co.*, 149 U.S. 308, 313-14 (1893).

"The essential characteristics of a tender are an unconditional offer to tender, coupled with a manifested ability to carry out the offer, and production of the subject matter of the tender." *Rothe Development Corp. v. Department of Defense*, 413 F.3d 1327, 1331 (Fed. Cir. 2005) (citation and quotation marks omitted). "[A] mere offer to perform does not suffice." *Ibid.* The defendant must "produce[] the subject matter of the tender, e.g., by providing [the plaintiff] with a . . . check or depositing such a check with the court." *Id.* at 1331-32. And, the tender "must not be made in such manner that the receipt of the money by the [plaintiff] prejudices his claim to a larger amount, either as a discharge or as an evidential admission." 13-67 Corbin on Contracts § 67.7.[7]

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[7] Thus, while a tender can moot a plaintiff's case, the factual question remains whether "[a]ny obligation of the defendant to pay . . . the [plaintiff] . . . has been extinguished," *San Pablo & T.R. Co.*, 149 U.S. at 313-14, including the defendant's liability for attorneys' fees and costs.

If the defendants wanted to moot the plaintiff's claim in this case, what they should have done is made an *unconditional* offer to pay the amount claimed by the plaintiff *and* either provided the plaintiff with a check in that amount or deposited a check in that amount with the court for retrieval by the plaintiff. *See* Fed. R. Civ. P. 67. Instead, what the defendants did was to make a conditional offer of judgment that was open for only a specified period of time. The offer was conditioned on the plaintiff accepting a specified amount as "the total amount Defendants shall be obligated to pay" on "all causes of action" asserted by the plaintiff. JA 80. No tender of the offered amount accompanied the offer of judgment. And, the offer had been withdrawn by the time the district court entered its order dismissing the plaintiff's claim as moot. It is certainly not the case that "[a]ny obligation of the defendant to pay to the [plaintiff] the sums sued for . . . has been extinguished by the offer," because the offer here does *not* "have the same effect as actual payment and receipt of the money." *San Pablo & T.R. Co.*, 149 U.S. at 313-14.

That this is so is further demonstrated by the fact that, had the plaintiff desired to accept defendants' offer of judgment at the time defendants filed their motion to dismiss, she could not have done so because that offer had already been withdrawn. At the time the district court dismissed the case, therefore, the plaintiff continued to "have a concrete interest . . . in the outcome of the litigation." *Knox*, 132 S. Ct. at 2287 (citations, quotation marks and brackets omitted).

II. DEFENDANTS SHOULD NOT BE ALLOWED TO USE A MOOT-AND-DISMISS TACTIC TO PREVENT OTHER SIMILARLY SITUATED EMPLOYEES FROM RECEIVING NOTICE AND HAVING AN OPPORTUNITY TO OPT-IN TO AN FLSA COLLECTIVE ACTION AS PARTY-PLAINTIFFS.

We demonstrate in point I that the expired offer of judgment by the defendants in this case did not constitute a tender sufficient to moot the plaintiff's FLSA claim and thus did not provide adequate grounds for the district court to dismiss even the plaintiff's own claim, let alone the entire lawsuit brought on behalf of the plaintiff and "others similarly situated." So that we are not misunderstood, in this section we explain that even if a sufficient tender had been made, the district court, in exercising its "discretion in managing [FLSA] actions," should have stayed any ruling on the motion to dismiss until the other similarly situated employees had been given notice of the pending lawsuit and a fair opportunity to opt-in. *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 174 (1989).

A. FLSA "§ 216(b)[] expressly authorizes employees to bring collective [FLSA] actions 'in behalf of . . . themselves and other employees similarly situated.' 29 U.S.C. § 216(b)." *Hoffmann-La Roche*, 493 U.S. at 170. "Section 216(b)'s affirmative permission for employees to proceed on behalf of those similarly situated . . . grant[s] the court [hearing such a lawsuit] the requisite procedural authority to manage the process of joining multiple parties in a manner that is

orderly, sensible, and not otherwise contrary to statutory commands or the provisions of the Federal Rules of Civil Procedure." *Ibid.*

A district court hearing an FLSA collective action should exercise its "managerial responsibility to oversee the joinder of additional parties" in a manner that ensures "[t]he broad remedial goal of the statute [will] be enforced to the full extent of its terms." *Id.* at 171 & 173. In particular, "it lies within the discretion of a district court," *id.* at 171, managing such a case to refrain from ruling on dispositive motions going to the particular claim of the plaintiff named in the complaint – such as a motion to dismiss on the grounds that the particular claim has been satisfied – until other similarly situated employees identified in the complaint have been given a reasonable opportunity to learn of the pending action and opt-in.

"Congress has stated its policy that [FLSA] plaintiffs should have the opportunity to proceed collectively." *Id.* at 170. This opportunity, "however, depend[s] on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." *Ibid.* "The collective action process should be able to play out according to the directives of § 216(b) and the cases applying it, to permit due deliberation by the parties and the court on collective action certification." *Nash v. CVS Caremark Corp.*, 683 F. Supp. 2d 195, 199 (D.R.I. 2010) (citation and quotation marks omitted).

As Judge William E. Smith explained in an illustrative case, "allowing Defendants to pick-off named FLSA plaintiffs one-by-one" through the use of "[t]he

moot-and-dismiss tactic" "can hamstring collective actions if allowed." *Ibid.* (citation and quotation marks omitted). *See id.* at 196-97 (citing numerous cases where "courts 'have refused to permit defendants to moot putative FLSA collective actions'"). This is particularly true because the statute of limitations on FLSA claims continues to run on the claim of each similarly situated employee who is not named in the complaint until the filing of the employee's opt-in form. 29 U.S.C. § 256(b). A strategy of "'[p]icking off' § 216(b) plaintiffs" can prevent or, at a minimum, "stall notification to potential 'similarly situated' parties" and thereby "bleed[]value out of a large pool of outstanding FLSA claims," *Nash*, 683 F. Supp. 2d at 200, by allowing the limitations period to run on the claims of potential party plaintiffs.

To take a particularly clear example, an FLSA defendant should not be allowed to cut-off the opt-in rights of employees who have already received notice of the pendency of an FLSA collective action by tendering payment satisfying the claims of the named plaintiffs before the other employees have a chance to "make informed decisions about whether to participate." *Hoffmann-La Roche*, 493 U.S. at 170. In those circumstances, a district court surely has discretion to refrain from ruling on the defendant's motion to dismiss the claim of the named plaintiff until there has been a chance for potential plaintiffs with live claims to opt-in. While the post-notice example is particularly compelling, there is nothing in principle that distinguishes the district court's exercise of discretion regarding when to take up a motion to dismiss either before or after a notice has gone out. Here, for example, the defendants

answered the collective action complaint and allowed discovery regarding "conditional certification" to begin before they sought to dismiss the plaintiff's claim as moot.

"[T]he control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases," *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991), provides district courts with adequate means to avoid this sort of "manipulation of cases," *Nash*, 683 F. Supp. 2d at 199.

"Federal District Courts have an inherent authority to manage their own dockets," and "the Federal Rules of Civil Procedure do not require the federal courts to decide motions in any particular order." *Pine v. Bd. of County Comm'n of Brevard County*, No. 6:06-cv-1551, 2007 U.S. Dist. LEXIS 90305, *17 (M.D. Fla. Dec. 7, 2007). Thus, faced with a motion to dismiss an FLSA collective action on the grounds that the named plaintiff's claim has become moot, a district court has discretion to refrain from immediately reaching that motion in order to allow "[t]he collective action process . . . to play out," *Nash*, 683 F. Supp. 2d at 199, "so that [the other employees similarly situated] can make informed decisions about whether to participate," *Hoffmann-La Roche*, 493 U.S. at 170. Once that process has played out, the district court can determine whether the named plaintiff's claim should be dismissed as moot. If other party plaintiffs with live claims have joined the action, the mootness of the named plaintiff's claim would not be cause to dismiss the entire action. However, if conditional certification is denied or no other party plaintiff joins the action and the named

plaintiff's claim is moot, the entire action should be dismissed.

B. There is an additional reason that employers should not be "allow[ed] . . . to pick-off named FLSA plaintiffs one-by-one" through the use of "[t]he moot-and-dismiss tactic." *Nash*, 683 F. Supp. 2d at 199 (citation and quotation marks omitted). That is that Congress made a considered decision that enforcement of the FLSA was best accomplished by allowing employees to proceed on a collective basis and therefore vested employees with a statutory right to maintain a collective action.[8]

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[8] When Congress adopted the Equal Pay Act in 1963, it incorporated the new guarantee of fairness into the FLSA and thereby extended employees' statutory right to maintain a collective action to enforcement of the guarantee of gender equality. *See* 29 U.S.C. § 206(d). In both houses of Congress, individual members expressed their understanding that the Equal Pay Act would "utilize the present means of enforcement" and extend to "employees who would be entitled to receive equal pay treatment under it the same remedies which are prescribed for workers in relation to minimum wage and overtime payments required by the Fair Labor Standards Act." 109 Cong. Rec. 8916 (1963) (statement of Sen. Randolph); 109 Cong. Rec. 9195 (1963) (statement of Rep. Powell). Similarly, in 1967 when Congress adopted the Age Discrimination in Employment Act, it incorporated by reference section 16(b) and thereby again extended employees' right to maintain a collective action to the enforcement of a new workplace guarantee. *See* 29 U.S.C. § 626(b). The Senate Committee Report on the bill that became the ADEA explained that it "[p]rovides for enforcement of the act in accordance with the powers, remedies and procedures of sections 11(b), 16 (except (a) thereof), and 17 of the Fair Labor Standards Act of 1938." S. Rep. No. 90-723, at 5 (1967).

This Court recognized the unique statutory status of the right to maintain a collective action in *Hoffmann-La Roche*: "The ADEA, through incorporation of § 216(b), *expressly authorizes* employees to bring collective age discrimination actions 'in behalf of . . . themselves and other employees similarly situated." 493 U.S. at 170 (emphasis added). This Court characterized section 16(b) as an "explicit statutory direction of a single ADEA action for multiple ADEA plaintiffs." *Id.* at 172. This Court further made clear that "Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively." *Id.* at 170.

The 1947 Portal-to-Portal Act amendments to the FLSA did not alter employees' statutory right to maintain an action "for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). Rather, the amendments were aimed at nonemployees – principally unions – which had filed actions on behalf of employees under the original FLSA. *See, e.g.*, S. Rep. No. 80-37, at 12-25 (1947) (detailing unions' involvement in litigation). The Senate Report, for example, specifically cites the use of forms with which employees designated union officials to represent them in FLSA actions. *Id.* at 17. Thus, the amendments eliminated the language allowing "such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated." Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. § 216(b)). This Court has thus observed that the 1947 amendments "left intact the 'similarly situat-

ed' language providing for collective actions, such as this one." *Hoffmann-La Roche*, 493 U.S. at 173.[9]

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[9] The legislative history of the Portal-to-Portal amendments makes express Congress' intention to fully preserve employees' right to maintain a collective action. Senator Forrest Donnell, chair of the Senate subcommittee that considered the bill, explained on the floor of the Senate that the original section 16(b) provided for "two types of action." 93 Cong. Rec. 2182 (March 18, 1947). "In the first case," Donnell explained, "an employee, a man who is working for the X steel company, can sue for himself and other employees. We see no objection to that." *Id.* "But," Donnell continued, "the second class of cases, namely cases in which an outsider, perhaps someone who is desirous of stirring up litigation *without being an employee at all*, is permitted to be the plaintiff in the case, may result in very decidedly unwholesome champertous situations which we think should not be permitted under the law." *Id.* (emphasis added). *See also* S. Rep. No. 80-37, at 48. The Senate adopted the Committee's bill as explained by Donnell. The Conference Committee, in turn, also accepted the Senate bill's elimination of only the second type of representative action identified by Senator Donnell. The Conference Report emphasized:

"Section 5 of the bill as agreed to in conference amends section 16(b) of the Fair Labor Standards Act of 1938, as amended, by repealing the authority now contained therein permitting an employee or employees to designate an agent or representative to maintain an action for and in behalf of all employees similarly situated. Collective actions brought by an employee or employees (a real party in interest) for and in behalf of himself or themselves and other employees similarly situated may continue to be brought in accordance with the existing provisions of the Act." H.R. Rep. No. 80-326, at 13 (1947) (Conf. Report).

See also 93 Cong. Rec. Senate 2085 (March 14, 1947) ("Detailed Comparison of Senate and House Versions"). The full Congress adopted the Portal-to-Portal amendments based on the Conference Committee's explanation that the amendments did not alter employees' right to maintain a collective action.

Congress gave employees the right to bring and maintain a collective action out of concern that many individual employees would be unable to effectively enforce their rights under the FLSA through independent lawsuits. Just three years before enacting the FLSA, Congress enacted the National Labor Relations Act of 1935 granting "employees" a right to representation for purposes of collective bargaining in recognition of the fact that individual employees often lack the knowledge, resources and power to improve their wages, hours and working conditions. 29 U.S.C. §§ 151, 157. As the Third Circuit observed, it was "very likely" that what "Congress had in mind" when adopting FLSA § 16(b) was "that employees, if they wish, can join in their litigation so that no one of them need stand alone in doing something likely to incur the displeasure of an employer. It brings something of the strength of collective bargaining to a collective lawsuit." *Pentland v. Dravo Corp.*, 152 F.2d 851, 853 (3d Cir. 1945). Both the NLRA and FLSA § 16(b) thus rested on congressional understanding that collective action is often essential to the enforcement of basic guarantees of workplace fairness.

In specifically vesting employees with a right to maintain a collective action in order to ensure enforcement of the FLSA, the EPA and the ADEA, Congress understood that actions to enforce employment laws must often be brought by current employees who are generally reluctant individually to sue their employer. During the debate over the Portal-to-Portal Act of 1947, which, as explained above, preserved employees' statutory right to maintain collective actions, Senator Olin Johnston made the point:

"Anyone who works in an unorganized mill – and approximately 80 percent of them in my State are unorganized – has a tendency to fear to bring suit while he is working for the meal ticket which he draws from week to week for the support of his wife and children." Cong. Rec. Senate 2371 (March 21, 1947). An individual employee paid below the minimum wage, female employees paid less than men for doing the same work, and senior employees passed over for promotion in favor of younger workers all may be reluctant to enforce their federal statutory rights if they are forced to do so one-by-one as individuals.

This Court itself has recognized, "it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). Indeed, this Court has long recognized that employees "are often induced by the fear of discharge" to accept such substandard conditions. *Holden v. Hardy*, 169 U.S. 366, 397 (1897). Thus, as the Fifth Circuit noted, it is "reasonably presumed" that an employee "might be unwilling to sue individually . . . for fear of retaliation at their jobs." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999). It was in large part to address such fear that Congress vested employees with the right to maintain a collective action under FLSA § 16(b). As one district court observed, "plaintiff-employees who proceed collectively [under section 16(b)] can present a united front against an employer, and head off individualized retaliation." *Bonilla v. Las Vegas Cigar Co.*, 61 F. Supp. 2d 1129, 1139 (D. Nev. 1999).

That is exactly why Congress vested employees, and specifically employees, with the right to maintain a collective action under section 16(b).

Depriving district courts of the discretion to order their own proceedings in order to permit section 16(b) to fulfill its statutory function would directly contravene Congress' intent.

CONCLUSION

The Court should affirm the judgment of the court of appeals or dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 11-1059

IN THE

Supreme Court of the United States

GENESIS HEALTHCARE CORP. AND
ELDERCARE RESOURCES CORP.,
Petitioners,

v.

LAURA SYMCZYK,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* SCHOLARS STEPHEN B. BURBANK, JOHN C. COFFEE, JR., CYNTHIA ESTLUND, AND DAVID L. SHAPIRO, IN SUPPORT OF RESPONDENT AND URGING AFFIRMANCE

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Dated: October 26, 2012

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BRIEF OF *AMICI CURIAE* SCHOLARS STEPHEN B. BURBANK, JOHN C. COFFEE, JR., CYNTHIA ESTLUND, AND DAVID L. SHAPIRO, IN SUPPORT OF RESPONDENT AND URGING AFFIRMANCE

INTEREST OF *AMICI CURIAE*

Amici Scholars (listed in the Appendix)[1] have an important interest in the question presented: whether an unaccepted and withdrawn Rule 68 settlement offer renders moot a collective action under Section 216(b) of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 216(b). *Amici* Scholars have studied and written extensively in the fields of law implicated by this question, which involves issues at the intersection of employment law and civil procedure.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici Scholars agree with Respondent and the United States that the mere receipt of a Rule 68 settlement offer does not moot an individual's Section 216(b) claim on the merits. But even if the plaintiff's individual claim were deemed to be moot, there would still be a justiciable controversy, in Article III terms, over whether to certify a collective

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[1] This brief has been filed with the written consent of the parties, which is on file with the Clerk of Court. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

action, given the FLSA's remedial scheme. A collective action under Section 216(b) has a public dimension that transcends a plaintiff's individual claim.

In the context of a class action under Rule 23, this Court has recognized that the procedural right of a named plaintiff to act on behalf of the collective interests of the class exists independently of the plaintiff's individual claim. In *Sosna v. Iowa*, 419 U.S. 393 (1975), for example, this Court explained that the class "acquire[s] a legal status separate from the interest asserted by" the named plaintiff." *Id.* at 399. "[T]his factor significantly affects the mootness determination." *Id.* Following *Sosna*, this Court applied the same principle in *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 407 (1980), *Deposit Guaranty National Bank of Jackson v. Roper*, 445 U.S. 326 (1980), and *Gerstein v. Pugh*, 420 U.S. 103 (1975).

Although Section 216(b) of the FLSA predates the 1966 class action amendments of Rule 23, the same principle recognized in *Sosna*, *Geraghty*, and *Roper* is salient here. Section 216(b) protects workers with unequal resources or bargaining power by providing a collective action mechanism. An action under Section 216(b) serves a public interest that is broader than an individual employee's claim.

In fact, the argument against mootness is stronger here than it was in the Rule 23 cases of *Sosna*, *Geraghty*, and *Roper*. The instant case involves not merely a procedural rule but a statutory remedy enacted by Congress. If a settlement offer extended under Rule 68 to an individual plaintiff

prior to (what has come to be called) a motion for "certification" could prevent a court from ever reaching the certification issue, the opportunity for the court to consider a Section 216(b) collective action would be at the mercy of a defendant, even in cases where such an action would be clearly appropriate. Thus, to allow a defendant to "pick off" individual named plaintiffs would thwart a collective action and frustrate the congressional purpose of Section 216(b).

To construe Rule 68 as overriding a statutory provision (Section 216(b)) that authorizes collective actions and requires trial judges to manage the notice and opt-in process of aggregating other plaintiffs, would be to raise serious questions under the Rules Enabling Act. Rule 68 should not be used to undercut Congress's carefully crafted system for enforcement of the FLSA.

In determining mootness in the context of a settlement offer, and to avoid undermining the congressional purpose of Section 216(b), a court may properly regard a collective action as one on behalf of the entire opt-in class from the date of filing of the complaint. In such a situation, a district court should permit an FLSA plaintiff to move for "certification" of a collective action under Section 216(b), and absent a judicial finding of undue delay, should relate the motion back to the filing of the initial complaint.

ARGUMENT

Amici Scholars agree with Respondent and the United States that a withdrawn and unaccepted Rule 68 offer does not moot a plaintiff's individual

claim. However, even if a Rule 68 offer could eliminate a plaintiff's personal stake in an action, such an offer would not moot a dispute about "certification" of a collective action pursuant to Section 216(b).

A. Section 216(b) Is An Integral Part of The Statutory Enforcement Scheme.

The Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"), was designed "to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 n.18 (1945).

Under the "collective action" mechanism set forth in 29 U.S.C. § 216(b), an employee alleging an FLSA violation may bring an action on "behalf of himself . . and other employees similarly situated," subject to the requirement that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." As this Court has noted, "Congress has stated its policy that . . . plaintiffs should have the opportunity to proceed collectively. A collective action allows . . . plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity." *Hoffmann-La Roche* v. *Sperling*, 493 U.S. 165, 170 (1989) (explaining that the Age Discrimination in Employment Act (ADEA)

incorporates the remedy of Section 216(b) of the FLSA).

Section 216(b) plays an important role in the statutory scheme by facilitating access to the courts. Otherwise, workplace dynamics and fear of reprisals may deter workers from bringing individual claims on their own or cooperating with government enforcement efforts. *See* Cynthia Estlund, REGOVERNING THE WORKPLACE 17-19, 60-68, 116-28, 142-47, 226-33 (2010). Although Petitioner notes that "at all times since the filing of the complaint, respondent has been the sole plaintiff" and that "no other individual ever has joined the complaint" (Pet. Br. 3), the reticence of Respondent's co-workers may reflect the pressures of the workplace rather than the absence of FLSA violations.

"[W]here the bare economics tempt employers to underpay their workers, public law typically does too little to outweigh that temptation and too little to induce employers to undertake serious self-regulatory efforts." Estlund, REGOVERNING THE WORKPLACE at 108. "Private rights of action enable individual employees, groups of employees, and their advocates to supplement government enforcement efforts and to provide added leverage and the possibility for prospective relief aimed at long-term corrective action." *Id.* at 109. "[A] private bar that represents employees" is onle way "to address the enforcement deficit" that employees "face in their workplaces." *Id.* at 108.

The record before Congress at the time of the FLSA's enactment demonstrated the need for a collective action mechanism. As one conferee stated,

Congress designed the collective-action device so that "employees [would] not suffer the burden of an expensive lawsuit." 83 Cong. Rec. 9264 (1938) (statement of Rep. Kent Keller). During the joint hearings on the Act, other members of Congress expressed concerns about efficiency. For example, the Chairman of the House Committee on Labor was concerned with the "multifariousness" of potential lawsuits and asked an expert what would happen if a "thousand men" brought suit. *Fair Labor Standards Act of 1937: Joint Hearings Before the S. Comm. on Educ. & Labor and the H. Comm. on Labor on S. 2475 and H.R. 7200*, 75th Cong. 461 (1937) (statement of Rep. William Connery). Another Representative worried that there would be "a thousand and one suits." *Id.* at 461 (statement of Rep. Albert Thomas); *see also id.* at 69 (statement of Rep. Albert Thomas) ("[I]t is going to put an undue burden on the dockets of the Federal court or even the State justice of the peace, all of those cases.").

Proponents, including then-Assistant Attorney General Robert H. Jackson, responded that the collective action device would address risks of multiple lawsuits. *See, e.g.*, *id.* at 70 (statement of Assistant Att'y Gen. Robert H. Jackson) ("[I]f you had a hundred employees in one factory, and you take an assignment of all their claims, the very purpose of this was to avoid a multiplicity of actions and to see that a single action was brought."). As one contemporary court remarked, "It brings something of the strength of collective bargaining to a collective lawsuit." *Pentland v. Dravo Corp.*, 152 F.2d 851, 853 (3d Cir. 1945). *See also Shain v. Armour & Co.*, 40 F. Supp. 488, 490 (W.D. Ky. 1941)

("The evident purpose of the Act is to provide one law suit in which the claims of different employees . . . can be presented and adjudicated.").

Although the FLSA has been amended more than a dozen times,[2] Congress has consistently declined the opportunity to amend the "similarly situated" phrase in the FLSA. Accordingly, every enacted version of the FLSA and even some of the earliest pre-enactment versions[3] have included a collective action device.[4]

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[2] For amendments to Section 216, see Act of May 14, 1947, ch. 52, § 5(a), 61 Stat. 87; Act of Oct. 26, 1949, ch. 736, § 14, 63 Stat. 919; Reorganization Plan No. 6 of 1950, §§ 1-2, 64 Stat. 1263; Act of Aug. 8, 1956, ch. 1035, § 4, 70 Stat. 1118; Aug. 30, 1957, Pub. L. No. 85-231, § 1(2), 71 Stat. 514; Act of May 5, 1961, Pub. L. No. 87-30, § 12(a), 75 Stat. 74; Act of Sept. 23, 1966, Pub. L. No. 89-601, tit. VI, § 601(a), 80 Stat. 844; Act of Apr. 8, 1974, Pub. L. No. 93-259, §§ 6(d)(1), 25(c), 26, 88 Stat. 61, 72, 73; Act of Nov. 1, 1977, Pub. L. No. 95-151, § 10, 91 Stat. 1252; Act of Nov. 17, 1989, Pub. L. No. 101-157, § 9, 103 Stat. 945; Act of Nov. 5, 1990, Pub. L. No. 101-508, tit. III, § 3103. 104 Stat. 1388-29; Act of Aug. 6, 1996, Pub. L. No. 104-174, § 2, 110 Stat. 1554; and Act of May 21, 2008, Pub. L. No. 110-233, tit. III, § 302(a), 122 Stat. 920.

[3] *See, e.g.*, Fair Labor Standards Act of 1937, S. 2475, 75th Cong. § 18(b) (as passed by Senate, Aug. 2, 1937).

[4] The original version of Section 216(b) allowed employees to "designate an agent or representative to maintain [an] action for and in behalf of all employees similarly situated." *Martino v. Mich. Window Cleaning Co.*, 327 U.S. 173, 175 n. 1 (1946) (quoting Fair Labor Standards Act of 1938, Pub.L. No. 75–718, § 16(b), 52 Stat. 1060, 1069 (1938)). In the Portal–to–Portal Act of 1947, Pub.L. No. 80–49, § 5(a), 61 Stat. 84, 87 (1947), Congress amended the FLSA to eliminate "representative actions" by plaintiffs who did not themselves possess claims under the statute. Congress also amended Section 216(b) by

B. An FLSA Collective Action Does Not Become Moot Even If An Individual Action Is Deemed To Be Moot.

In light of the public interest in a Section 216(b) collective action, and the importance of such a remedy to the FLSA statutory scheme, a collective action would still present a justiciable controversy if a Rule 68 offer were deemed to eliminate a plaintiff's individual stake in the case. In determining mootness in the context of a settlement offer, a court should regard a collective action as one on behalf of the entire opt-in class from the date of filing of the complaint. Such relation-back is necessary to avoid

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inserting a requirement that similarly situated employees affirmatively "opt in" to an ongoing FLSA suit by filing express, written consents in order to become party plaintiffs. Neither of the 1947 statutory changes removed the ability of injured employees to bring collective actions on behalf of themselves or similarly situated employees. In fact, the relevant committee reports reaffirmed that "[c]ollective actions brought by an employee or employees (a real party in interest) for and in behalf of himself or themselves and other employees similarly situated may continue to be brought in accordance with the existing provisions of the Act." H.R. Rep. No. 80-326, at 13 (1947) (Conf. Rep.); S. Rep. No. 80-37, at 48 (1947); S. Rep. No. 80-48, at 49 (1947). As Representative Samuel Hobbs, a member of the subcommittee that drafted the Portal-to-Portal Act, explained, "[t]he only thing we are after by that provision is the unauthorized suing for people who do not want it done." 93 Cong. Rec. 1560 (1947). Likewise, Senator Forrest Donnell, the chairman of the subcommittee that conducted the hearings on the legislation, sharply distinguished between collective and representative actions and emphasized that Congress had "no objection" to employees suing for themselves and other employees. *See* 93 Cong. Rec. 2182.

undermining the congressional purpose of Section 216(b).

The collective action remedy under Section 216(b) has a public dimension that transcends a plaintiff's individual claim. As this Court has recognized, the statute contemplates active judicial involvement in the notice and opt-in process of collective actions. "Section 216(b)'s affirmative permission for employees to proceed on behalf of those similarly situated must grant the court the requisite procedural authority to manage the process of joining multiple parties in a manner that is orderly, sensible, and not otherwise contrary to statutory commands or the provisions of the Federal Rules of Civil Procedure." *Hoffmann-La Roche* v. *Sperling*, 493 U.S. at 170. The benefits of the statute "depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." *Id.* at 170. Accordingly, once a plaintiff files a Section 216(b) action, "the court has a managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way." *Id.* at 170-71. "The court is not limited to waiting passively for objections about the manner in which the consents were obtained. By monitoring preparation and distribution of the notice, a court can ensure that it is timely, accurate, and informative." *Id.* at 172.

In the context of a class action under Rule 23, this Court has recognized the procedural right of a named plaintiff to act on behalf of the collective interests of the class – a right that exists

independently of the plaintiff's substantive claims. In *Sosna v. Iowa*, 419 U.S. 393 (1975), for example, this Court explained that the mooting of a class representative's individual claims does not invariably result in the mooting of the entire action because "the class of unnamed persons described in the certification acquire[s] a legal status separate from the interest asserted by [the named plaintiff]." *Id.* at 399. "[T]his factor significantly affects the mootness determination." *Id.* "The controversy may exist . . . between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot." *Id.* at 402. In order to give effect to the purposes of Rule 23, this Court conceived of the named plaintiff as a part of an indivisible class and not merely as a solitary adverse party. In such circumstances, the "relation back" doctrine allows a court to retain jurisdiction over a matter that would appear susceptible to dismissal on mootness grounds by virtue of the expiration or satisfaction of the named plaintiff's individual claims.

Following *Sosna*, this Court has applied the same principle in a series of cases, including:

U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 407 (1980), which held that an action brought on behalf of a class did not become moot upon expiration of the named plaintiff's substantive claim and that Geraghty was therefore a proper representative for the purpose of appealing the ruling denying certification of the class that he initially defined. The Court disavowed a "rigidly formalistic approach to Art. III" as "rest[ing] on a fundamental misconception about the mootness of an

uncertified class action after settlement of the named plaintiffs' claims." *Id.* at 404 n.11;

Deposit Guaranty National Bank of Jackson v. Roper, 445 U.S. 326 (1980), which held that neither a defendant's tender to each plaintiff of the maximum amount that each could have recovered nor the district court's entry of judgment in favor of plaintiffs over their objections mooted the plaintiffs' interest in the resolution of the class certification question, and that the plaintiffs could therefore appeal from district court's ruling denying class certification; and

Gerstein v. Pugh, 420 U.S. 103 (1975), which held that a class action challenging pretrial detention conditions was not moot, even though the named plaintiffs were no longer in custody, and there was no indication that the particular named plaintiffs might again be subject to pretrial detention. This Court opined that "in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case." *Id.* at 110 n.11.

C. Petitioner's Attempts To Distinguish Rule 23 Precedent Is Unavailing.

Petitioner has proposed two differences between the Rule 23 line of precedent and the instant case, but neither difference is meaningful. In fact, the case against mootness is stronger in the FLSA context than it was in the Rule 23 cases of *Sosna*, *Geraghty*, and *Roper*.

1. Petitioner contends that in *Roper* and *Geraghty* the trial court already had ruled on a class certification motion before the vitiation of the personal stake of the named plaintiffs. Pet. Br. 22. Here, the district court did not have the opportunity to rule on a motion for certification before Petitioner made its Rule 68 offer of judgment.

But the timing of the offer of judgment is entirely within the control of the defendant, and to make the sequence of events determinative would ignore the mandate of the FLSA that puts judges in charge of the process and instead give the defendant unilateral control over whether a court is able to entertain a certification motion. As this Court warned in *Roper*, to permit a defendant "to 'buy off' the individual private claims of the named plaintiffs would be contrary to sound judicial administration. Requiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement." 445 U.S. at 339.

Under Petitioner's approach, a fast-acting defendant could achieve the very result the Court sought to avoid in cases like *Roper* and *Geraghty* by making the offer of settlement immediately on receipt of the complaint. Indeed, because collective actions under Section 216(b) may involve comparatively fewer and more readily identifiable members than Rule 23 class actions, concerns about "picking off" plaintiffs are especially acute in the

Section 216(b) context. FLSA cases also present heightened efficiency considerations, because claims for lost wages may be relatively small and the costs of litigation prohibitive for each individual employee.

The time-intensive nature of the notice and opt-in process under Section 216(b) further underscores the importance of affording prospective plaintiffs a sufficient opportunity to join a suit. As this Court has observed, district courts have developed ways of managing the notice and opt-in process under the FLSA. "[T]rial court involvement in the notice process is inevitable in cases with numerous plaintiffs where written consent is required by statute." *Hoffmann-La Roche* v. *Sperling*, 493 U.S. at 171. It takes time for a lead plaintiff to provide other employees with notice of the suit, for prospective plaintiffs to opt-in, and for a district court to manage the process. During this period of delay, collective actions under Section 216(b) could prove vulnerable to pick-off strategies by defendants. In short, Petitioner's approach would fly directly in the face of the congressional purpose in enacting Section 216(b).

Hence, an FLSA plaintiff must be given time and an opportunity to move to certify a collective action before a defendant can attempt to moot the claim through an offer of judgment. In *Geraghty*, this Court indicated that, given the relation back doctrine, the precise timing of a class certification motion is not crucial to the mootness inquiry. *See* 445 U.S. at 398 ("Although one might argue that *Sosna* contains at least an implication that the critical factor for Art. III purposes is the timing of class certification, other cases, applying a 'relation

back' approach, clearly demonstrate that timing is not crucial.").

Similarly, although *Sosna* itself involved a situation where the district court had ruled on the certification motion, this Court indicated that such a ruling was not a prerequisite to application of the relation back principle. *See* 419 U.S. at 402 n.11 ("There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them *before the district court can reasonably be expected to rule on a certification motion*. In such instances, whether the certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.") (emphasis added). Accordingly, absent a judicial finding of undue delay, when an FLSA plaintiff moves for "certification" of a collective action, the appropriate course is for the district court to relate the motion back to the filing of the initial complaint.

Petitioners acknowledge that "a district court's class certification decision is so important that there is an independent interest in obtaining appellate review of it." Pet. Br. 22. But the same reasoning applies to Section 216(b) collective actions as well. Such actions are sufficiently important to the FLSA remedial scheme that there is an independent interest in ensuring that a court has the opportunity to consider certification. The "relation back" principle is necessary to vindicate the congressional purpose embodied in Section 216(b).

The Court recognized a similar interest of absent class members in *Smith v. Bayer*, 131 S.Ct. 2368 (2011), which held that a denial of motion for class certification by one named plaintiff does not preclude future efforts to sue on behalf of a class by other class members. *Id.* at 2379-80. The Court concluded that a class action was not barred by an event occurring prior to a certification motion (the denial of certification in a previous case), because absent class members have an interest in pursuing their own claims. Indeed, a putative member of an uncertified class may wait until after the court rules on the certification motion to file an individual claim or move to intervene in the suit. *Id.* at 2379 n.10. The same interest in preserving the ability of class members to vindicate their claims is present here. The possibility of a collective action must be kept alive until a court has the opportunity to rule on certification in order to prevent a defendant from sabotaging the class by offering to buy off the individual plaintiff.

The procedural history of the instant case illustrates the fatal flaw in any rule that would allow defendants to moot collective actions via offers of judgment extended before motions for certification are filed. In this case, the district court scheduled discovery to enable Respondent to develop the evidence necessary for a certification motion, but Petitioner had already extended the Rule 68 offer before such discovery could even begin.[5] The Court

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[5] *See* Pet. App. 4a-5a ("The District Court—unaware of the offer of judgment—held a Fed.R.Civ.P. 16 scheduling conference on March 8, 2010. Two days later, the court entered a scheduling order providing for 'an initial ninety (90) day

of Appeals explained that discovery would have enabled Respondent to make a more "meaningful motion" for certification. Pet. App. 10a n.5.[6] The Court of Appeals observed that "had the [district] court in fact facilitated notice to potential opt-ins based solely on the allegations in [Respondent's] complaint, defendants' Rule 68 offer may not have antedated the arrival of a consent form from a party plaintiff, an occurrence that would have fundamentally transformed the court's mootness analysis." *Id.* Clearly, however, the judicial system would be better served by a rule that enables plaintiffs to develop basic discovery before moving for certification, rather than forcing them to avoid

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discovery period, at the close of which [Symczyk] will move for conditional certification under § 216(b) of the FLSA.' Following the court's ruling on certification, the parties were to have 'an additional six (6) month discovery period, to commence at the close of any Court-ordered opt-in window.'").

[6] *See* Pet. App. 10a n.5 ("Here, the [district] court—unaware of defendants' Rule 68 offer—issued a case management order allotting Symczyk 'an initial ninety (90) day discovery period' to compile evidence before she would be expected to move for 'conditional certification.' Symczyk represents she considered the standard for 'conditional certification' a 'moving target in our circuit' and requested discovery in order to buttress the allegations in her pleadings with sufficient evidence to make a 'meaningful motion' at this initial stage. Because defendants' Rule 68 offer preceded the commencement of this preliminary discovery period, however, Symczyk had no opportunity to gather such evidence before the court granted defendants' motion to dismiss. Had Symczyk been operating under the assumption that the court would employ the 'substantial allegation' standard, she may have been prepared to move for 'conditional certification' without conducting minimal discovery.").

mootness risks by seeking certification and opt-in consent forms prematurely, on the basis of barebones pleadings.

In order to ensure that a district court has the opportunity to consider certification, the relevant date for relation back in this context must be the date when the complaint was filed. Indeed, this Court has recognized the relevance of the date of filing for purposes of determining mootness. In *Sosna*, this Court explained that such certification "can be said to 'relate back' to the filing of the complaint" when the issue might otherwise evade review. 419 U.S. at 402 n.11. Similarly, in *Geraghty*, the Court distinguished the facts in *Gerstein v. Pugh* from a case that was "brought a day after the prisoner was released." 445 U.S. at 404 n.11. In the present case, relation back to the date of filing is plainly required if defendants are to be prevented from frustrating the remedial scheme of the FLSA.[7]

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[7] To be sure, the Court in *Geraghty* itself, at note 11, limited relation back to "the date of the original denial [of certification]." This was sufficient to avoid mootness in that case, but the date of denial is not one with juridical significance with respect to the issues at stake in this case. As noted above, this Court made clear in *Smith v. Bayer*, 131 S.Ct. 2368 (2011), that a denial of certification on motion of one class member does not bar future efforts to sue on behalf of a class by other class members. And as shown by the references in the text, the key to all the Court's decisions in this area is the importance of keeping the class action alive until a definitive ruling – after appeal if necessary – could be rendered on the appropriateness of certification. In the context of an offer of settlement to the individual plaintiff in a Section 216(b) collective action, that goal can be achieved (if the offer would otherwise moot the

2. Petitioner also contends that the instant case differs from the *Sosna* line of precedent because, unlike a class action pursuant to Rule 23, this case involves an opt-in collective action under Section 216(b), one in which no member of the class is ever part of the case, or bound by its result, until and unless that member signs a written consent to become a party.

Whatever the relevance of the opt-in/opt-out distinction in other contexts, it is not decisive on the question of mootness. Here, the purpose of the relation back concept is the same in both types of cases: to allow a plaintiff to serve as the class representative of a similarly situated group whose members might lack the ability to pursue such an action on their own. The status of a case as an "opt-in" or "opt-out" action has no bearing on whether a defendant may unilaterally moot a plaintiff's case through a Rule 68 offer of judgment. Each type of action would be rendered a nullity if defendants could "pick off" representative plaintiffs as soon as they filed suit. In short, the policies behind applying the "relation back" principle for Rule 23 class actions apply with equal force to Section 216(b) collective actions.

If anything, the differences between Rule 23 and Section 216(b) cut in favor of Respondent, not Petitioner. Section 216(b) is not simply a procedural rule like Rule 23, which under the Rules Enabling Act, 28 U.S.C. § 2072(b), may not be construed to alter a scheme of substantive rights. *See Wal-Mart*

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individual's claim) only by allowing relation back of the class certification to the filing of the complaint.

Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2561 (2011) ("[T]he Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right' ...") (quoting 28 U.S.C. § 2072(b)); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) ("The Rules Enabling Act underscores the need for caution. As we said in *Amchem*, no reading of the Rule can ignore the Act's mandate that 'rules of procedure "shall not abridge, enlarge or modify any substantive right."'") (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997)); *see also* Fed. R. Civ. P. 82 (providing that procedural rules "do not extend or limit the jurisdiction of the district courts").

By contrast, a collective action under Section 216(b) is a statutory action, integral to a congressional scheme aimed at vindicating the substantive rights created by the FLSA. A collective action brought pursuant to an Act of Congress raises no issues under either the Enabling Act or under Rule 82.

Indeed, it is Petitioner's approach that raises questions under the Rules Enabling Act. Petitioner seeks to transform Rule 68 into a tool for defendants to undercut Congress's carefully crafted system for enforcement of the FLSA, by allowing defendants to use Rule 68 to "pick off" plaintiffs in collective actions.

The Rules Enabling Act forbids an interpretation of Rule 68 that would abridge substantive rights – much less one that would nullify the FLSA remedial scheme. Rule 68 says nothing about mootness. It provides simply that "[a]n unaccepted offer is considered withdrawn," and "[e]vidence of an

unaccepted offer is not admissible except in a proceeding to determine costs." Rule 68(b). The Rule 68 sanction for not accepting an offer is a limited one: an award of costs to the defendant in the event that the plaintiff does not recover more than the amount of the offer. Rule 68(d). If anything, this sanction assumes that an unaccepted offer does *not* moot a plaintiff's claim and that the case would proceed to trial. The 1946 Advisory Committee Notes refer to the effect of the offer "as long as the case continues—whether there be a first, second or third trial." Rule 68, in short, is oblivious to the question of mootness.

The scope of Rule 68 is limited. "The plain purpose of Rule 68 is to encourage settlement and avoid litigation." *Marek v. Chesny*, 473 U.S. 1, 5 (1985). Rule 68 does not operate to divest a trial judge's discretion over costs for purposes of Rule 54(d). *See Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981). Proposals in 1983 and 1984 to "put teeth into" Rule 68 (by, for example, authorizing courts to impose sanctions for unreasonable rejections of settlement offers) proved so controversial that they were withdrawn. *See* Stephen B. Burbank, *Proposals to Amend Rule 68 – Time to Abandon Ship*, 19 U. MICH. J. L. REFORM 425, 426, 428-29 n.20 (1985-1986).

Rule 68 should not be stretched to create a collision with the FLSA. Yet Petitioner seeks to manipulate Rule 68 to deny similarly situated employees a genuine chance to opt into a collective action, even though that is precisely the approach that Congress provided in Section 216(b).

Rule 68 should not be interpreted as frustrating the statutory scheme in such a manner. The proper course is to hold that when a FLSA plaintiff files a timely motion for certification of a collective action, that motion relates back to the date the plaintiff filed the initial complaint.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-1059

In the Supreme Court of the United States

GENESIS HEALTHCARE CORPORATION AND
ELDERCARE RESOURCES CORP., PETITIONERS
v.
LAURA SYMCZYK

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN HEALTH CARE ASSOCIATION, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS, THE NATIONAL CENTER FOR ASSISTED LIVING, AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a case becomes moot, and thus beyond the judicial power of Article III, when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff's claims.

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INTEREST OF *AMICI CURIAE*

Amicus curiae the Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation, representing 300,000 direct members and representing indirectly the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every geographic region of the United States.* An important function of the Chamber is to represent the interests of its members by participating as *amicus curiae* in cases involving issues of national concern to American business. Cases raising significant questions for employers subject to potential class or collective actions are of particular concern to the Chamber and its members. *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012) (addressing level of deference owed Department of Labor's interpretation of Fair Labor Standards Act in collective action where Chamber submitted petition- and merits-stage *amicus* briefs advocating stability and clarity in statutory enforcement); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (addressing standard for class certification in case where Chamber submitted petition- and merits-stage *amicus* briefs advocating strict compliance with Rule 23 requirements).

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* No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners have filed a letter with the Clerk granting blanket consent to the filing of *amicus* briefs. Respondent's written consent to the filing of this brief has been filed with the Clerk.

Amicus curiae the American Health Care Association (AHCA) is the Nation's largest association of long-term and post-acute care providers, representing the interests of nearly 11,000 nonprofit and proprietary facilities. AHCA's members are dedicated to improving the delivery of professional and compassionate care to more than 1.5 million frail, elderly, and disabled citizens who live in nursing facilities, subacute centers, and homes for persons with developmental disabilities. AHCA advocates for quality care and services for frail, elderly, and disabled Americans. In order to ensure the availability of such services, AHCA also advocates for the continued vitality of the long-term and post-acute care provider community.

Amicus curiae the National Federation of Independent Business (NFIB) is the Nation's leading small business advocacy association, representing members in Washington, D.C., and in all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents approximately 350,000 member-businesses nationwide and its membership spans the spectrum of business operations, ranging from sole-proprietor enterprises to firms with hundreds of employees. The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the Nation's courts through representation on issues of public interest affecting small businesses. To fulfill that role, the NFIB Legal Center frequently files

amicus briefs in cases that will affect small businesses.

Amicus curiae the National Center for Assisted Living (NCAL) is a federation of state affiliates representing more than 2,700 nonprofit and for-profit assisted living and residential care communities nationwide. NCAL is dedicated to promoting high-quality, principle-driven assisted living care and services with a steadfast commitment to excellence, innovation, and the advancement of person-centered care.

Amicus curiae the Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. SHRM represents over 250,000 human resources professionals who make up its membership. The purposes of SHRM, as set forth in its bylaws, are to promote the use of sound and ethical human resources management practices in the profession, and (a) to be a recognized world leader in human resources management; (b) to provide high-quality, dynamic, and responsive programs and service to its customers with interests in human resources management; (c) to be the voice of the profession on human resources management issues; (d) to facilitate the development and guide the direction of the human resources profession; and (e) to establish, monitor, and update standards for the profession. Founded in 1948, SHRM currently has more than 575 affiliated chapters within the United States and members in more than 140 countries.

Amici have a significant interest in cases presenting important questions under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219. The FLSA

establishes nationwide rules related to minimum wages, maximum hours, and overtime pay. The statute covers more than 130 million workers in every conceivable industry. *See The Fair Labor Standards Act: Is It Meeting the Needs of the Twenty-First Century Workplace?, Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce,* 112th Cong. 2 (2011) (statement of Rep. Walberg) (*21st Century Hearing*).

Amici are committed to filing briefs in important cases seeking legal clarity so that their members can comply with all laws, including the FLSA. The vast majority of the Nation's employers dedicate significant time, energy, and resources to achieve such compliance, while at the same time creating much-needed jobs. *Amici* therefore have a significant interest in ensuring that their members are spared the significant burden and expense imposed by private lawsuits prosecuted, not by plaintiffs with a personal stake in the outcome as required by Article III, but by lawyers in search of new clients. The decision of the United States Court of Appeals for the Third Circuit at issue here interprets the Court's Article III jurisprudence to permit exactly that, holding that putative collective actions under the FLSA must continue even though the defendants have offered the only named plaintiff complete relief and no other employee has affirmatively joined the suit.

SUMMARY OF ARGUMENT

Petitioners' brief explains thoroughly why the Third Circuit's decision cannot be reconciled with core jurisdictional limitations imposed by Article III. *Amici* wish to emphasize two additional reasons why the Third Circuit's judgment should be reversed.

First, if left undisturbed, the decision below will further exacerbate the significant burden already placed on employers who have been subjected to an exponential increase in private FLSA litigation. In the past decade alone, the number of FLSA suits filed annually has grown by almost 300 percent, affecting nearly every segment of the national economy. Because the FLSA is a strict-liability statute that requires courts to award attorney's fees to prevailing plaintiffs regardless of the wage amount at issue, and because the FLSA's coverage is subject to considerable uncertainty, employers that reasonably believe they have complied with the FLSA are often forced to settle unmeritorious collective actions rather than face the risk of catastrophic judgments. By holding that putative collective actions under the FLSA must continue even though the defendants have offered the only named plaintiff complete relief and no other employee has joined the suit, the Third Circuit's decision deprives employers of a reasonable means to avoid burdensome FLSA litigation early on, based primarily on the Third Circuit's policy judgment that further discovery and litigation *might* motivate *others* to join a suit being prosecuted by counsel who no longer represents a client with a personal stake in the case's outcome. A judicial system based on such speculation is antithetical to the adversarial system guaranteed by Article III, which is designed to adjudicate only those disputes between actual parties with a live case or controversy.

Second, in endorsing as a perceived necessity continued litigation by private attorneys who no longer represent a client with a personal stake in the case's outcome, the Third Circuit's decision overlooks the

important role played by government enforcement of the FLSA. Congress, which has acted to limit private enforcement of the FLSA by banning representative actions and requiring employees affirmatively to opt in to such cases, has granted the Department of Labor wide-ranging authority to sue on behalf of employees in order to collect unpaid wages and overtime compensation. While subject to its own potential limitations, government enforcement of the FLSA serves as a congressionally authorized repository of power to help ensure that truly meritorious FLSA cases are pursued in the best interests of employees—the statute's sole intended beneficiaries—and not the best interests of plaintiff's lawyers.

ARGUMENT

I. Left Uncorrected, the Third Circuit's Decision Will Further Exacerbate the Significant Burden Already Placed on Employers By an Ever-Rising Wave of Private FLSA Litigation

The Third Circuit concluded that putative collective actions under the FLSA must continue even though the defendants have offered the only named plaintiff complete relief and no other employee has joined the suit. In doing so, the Third Circuit's decision deprives employers of one of the only reasonable means to avoid burdensome litigation in the FLSA context—all in the hope that further discovery and litigation might motivate others to join a suit being prosecuted by counsel who no longer represents a client with a personal stake in the case's outcome. The Third Circuit's decision therefore effectively transforms federal courts into roving commissions seeking evidence of potential wrongdoing involving

parties not before the court, thereby creating an inquisitorial judicial system Article III prohibits.

This is no mere technicality raised in the context of an arcane, rarely asserted statutory cause of action. The past decade has witnessed nothing less than an explosion in FLSA litigation. Statistics published by the Administrative Office of the United States Courts reveal that for the 12-month period ending March 31, 2001, a total of 1,961 FLSA actions were commenced in district courts throughout the United States. *Federal Judicial Caseload Statistics* 46 (2001). For the 12-month period ending March 31, 2011, that number had grown to 7,008—a nearly 300 percent increase. Administrative Office of the U.S. Courts, *Federal Judicial Caseload Statistics* 48 (2011); *see also 21st Century Hearing* at 29 (charting exponential increase in number of FLSA actions).

Two factors are widely credited with driving the drastic increase in FLSA litigation. First, unlike most federal statutes creating private rights of action, the FLSA *requires* a district court to award attorney's fees to a successful plaintiff, regardless of the wage amount at issue. *Compare, e.g.*, 29 U.S.C. § 216(b) ("The court in [an FLSA] action *shall*, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.") (emphasis added), *with* 5 U.S.C. § 552(a)(4)(E)(i) (granting district courts discretion to award attorney's fees in Freedom of Information Act cases); 29 U.S.C. § 794a(b) (granting same in Rehabilitation Act cases); 29 U.S.C. § 1132(g)(1) (granting same in Employee Retirement Income Security Act cases); 29 U.S.C. § 2617(a)(3) (granting same in Family and

Medical Leave Act cases); 30 U.S.C. § 1270(d) (granting same in Surface Mining Control and Reclamation Act cases); 33 U.S.C. § 1365(d) (granting same in Clean Water Act cases); 42 U.S.C. § 1988(b) (granting same in private actions under various civil rights statutes); 42 U.S.C. § 7604(d) (granting same in Clean Air Act cases); *see also* Fed. R. Civ. P. 23(h) (explaining that district courts in certified class actions "may" award attorney's fees if authorized to do so by law or by the parties' agreement). Successful FLSA defendants, in contrast, are not even permitted a discretionary award of attorney's fees.

The FLSA's mandatory attorney's fee provision creates a significant financial incentive for plaintiff's counsel to litigate FLSA cases rather than resolve them on reasonable terms. In fact, it is not uncommon for attorney's fees and costs to dwarf the amount of wages at issue in FLSA cases. *See, e.g.*, *Perrin v. John B. Webb & Assocs.*, No. 6:04-cv-00399, 2005 WL 2465022, at *5 (M.D. Fla. Oct. 6, 2005) (awarding over $7,700 in attorney's fees and costs even though underlying claim was for wages totaling $270); *Spencer v. Cent. Servs., LLC*, No. 1:10-cv-03469, 2012 WL 142978, at *4 (D. Md. Jan. 13, 2012) (awarding over $57,000 in attorney's fees and costs even though underlying claim was for wages totaling $8,750); *see also Allende v. Unitech Design, Inc.*, 783 F. Supp. 2d 509, 511 (S.D.N.Y. 2011) ("While the requested attorneys' fees exceed plaintiffs' own recovery in the case, that is of no matter. In FLSA cases, . . . the attorneys' fees need not be proportional to the damages plaintiffs recover . . . .").

Second, the FLSA is a strict-liability statute whose coverage is subject to considerable uncer-

tainty. For example, the FLSA's minimum-wage and maximum-hour requirements do not apply to any individual employed in a "bona fide executive, administrative, or professional capacity . . . , or in the capacity of outside salesman . . . ." 29 U.S.C. § 213(a)(1). The FLSA does not define these terms. Until recently, changes in the Department of Labor's interpretation of the "outside salesman" exemption had caused significant uncertainty and enormous potential liability for pharmaceutical manufacturers. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2162 (2012) (describing regulatory changes promulgated by Department in 2004 and refusing to give deference to interpretation of same contained in Department's *amicus* brief); *see also Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 168-71 (2007) (addressing literal inconsistency within Department's FLSA regulations implementing statutory exemption for domestic workers providing companionship services); *Mortg. Bankers Ass'n v. Solis*, --- F. Supp. 2d ---, No. 1:11-cv-00073, 2012 WL 2020987, at *13 (D.D.C. June 6, 2012) (addressing legal challenge of Department's decision to rescind previous interpretation of FLSA's "administrative" exemption as applied to mortgage loan officers), *appeal docketed*, No. 12-5246 (D.C. Cir. Aug. 8, 2012). Even the most basic question of what constitutes compensable "work" is subject to significant debate. *See 21st Century Hearing* at 25-26 (surveying conflicting judicial decisions).

Against this backdrop of legal uncertainty exists the fact that the FLSA has no intent element. An employer's good-faith belief that it has complied with the statute serves only as a limited defense if subse-

quent judicial decisions interpret the statute differently. Specifically, the FLSA shortens the statute of limitations from three years to two if the employer's violation is not willful, 29 U.S.C. § 255(a), and gives a district court discretion not to award double damages if the employer "shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that [the employer] had reasonable grounds for believing that [its] act or omission was not a violation of" the FLSA, § 260. However, even an employer's reasonable, good-faith belief that it has complied with the statute does not limit the award of attorney's fees.

Therefore, the practical reality is that putative collective actions under the FLSA impose significant costs on employers of every size and in every segment of the national economy. A review of the Department of Labor's website reveals the staggering diversity of private and public employers potentially subject to the FLSA and litigation thereunder. *See* U.S. Dep't of Lab., *Topical Fact Sheet Index*, http://www.dol.gov/whd/fact-sheets-index.htm (last visited Sept. 5, 2012) (listing separate FLSA "fact sheets" targeting employers and employees in such diverse industries as agriculture, amusement parks, automobile dealerships, call centers, car washes, construction, daycare, firefighting, grocery stores, home health care, insurance, law enforcement, lodging, lifeguarding, maintenance, manufacturing, nursing, real estate, retail, roofing, state government, transportation, warehousing, and wholesaling).

The FLSA's collective-action device allows plaintiff's counsel to leverage easily a lawsuit involving a single employee's claim into a lawsuit of nationwide

scope involving tens of thousands of employees. Once that occurs, the pressure on employers to settle is so great that it is the rare case that produces a trial, let alone an appeal of a final judgment entered after trial. As one knowledgeable employment counsel explained recently in testimony before Congress, "when you look at the threat of these lawsuits and you understand the risks of going to trial, decisions are made on a business level to make payments that are dramatic compromises . . . ." *21st Century Hearing* at 52 (statement of Richard L. Alfred, Esq.); *see also id.* at 29 (cataloging recent settlements ranging from $38 million to $135 million in suits brought against employers in the financial-services, insurance, retail, and technology industries).

This phenomenon persists regardless of whether an FLSA violation actually occurred. As the same witness explained:

> If one were to examine the way a collective action works under the [FLSA], one would quickly see that the risks to employers may be enormous. That doesn't mean that employers did anything wrong. Oftentimes, the analysis is that they did not. The problem is, in a collective action, the case may be what is called conditionally certified at the very beginning of the lawsuit with a very low burden. Almost all cases are. That then triggers legal mechanisms that allow the hundreds, thousands, and more people to join the case.

21st Century Hearing at 51.

The Third Circuit's decision therefore deprives employers of a reasonable means to avoid burdensome litigation early on by offering complete relief to the only party before the court claiming injury, all

for the policy-based reason of promoting private enforcement of the FLSA. *See* Pet. App. 25 (concluding that considerations of efficiency and economy "caution against allowing a defendant's use of [offers of judgment] to impede the advancement of a representative action"). Article III, however, does not permit the continuation of litigation based solely on speculation that further discovery and litigation might generate new cases or controversies involving parties not presently before the court. Instead, Article III requires a dispute between actual parties with a live case or controversy who have a personal stake in the case's outcome.

II. The Third Circuit's Decision Overlooks the Important Role Played By Government Enforcement of the FLSA

Since its enactment in 1938, the FLSA has included a mechanism for employees to sue their employers for violations of the statute. *See* Fair Labor Standards Act of 1938, ch. 676, § 16(b), 52 Stat. 1060, 1069 (codified as amended at 29 U.S.C. § 216(b)). As an incentive to bring such suits, employees may recover not only unpaid wages, but an equal amount as liquidated damages, as well as attorney's fees and costs. 29 U.S.C. § 216(b).

Congress has narrowed the scope of the FLSA's private-enforcement scheme over time. As first enacted, the FLSA allowed private actions to be brought "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, *or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees simi-*

larly situated." Fair Labor Standards Act of 1938 § 16(b), 52 Stat. at 1069 (emphasis added).

Congress amended the FLSA less than a decade later, citing concerns over "excessive and needless litigation and champertous practices." Portal-to-Portal Act of 1947, ch. 52, § 1(a)(7), 61 Stat. 84 (codified at 29 U.S.C. § 251(a)(7)). As is relevant here, Congress banned representative actions by deleting the "designate an agent or representative" clause from the FLSA's private right of action. *Id.* § 5(a), 61 Stat. at 87. To ensure that employees have a say over their own interests and that suits are not prosecuted by persons lacking a personal stake in the case's outcome, Congress also added a formal opt-in system whereby "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." *Id.* (codified at 29 U.S.C. § 216(b)); *see also Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989) ("In part responding to excessive litigation spawned by plaintiffs lacking a personal interest in the outcome, the representative [FLSA] action by plaintiffs not themselves possessing claims was abolished [by Congress], and the requirement that an employee file a written consent was added.").

Importantly, while Congress limited private enforcement of the FLSA shortly after the statute's enactment, Congress later gave the Department of Labor significant power to enforce the FLSA on behalf of employees. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 26, 88 Stat. 61, 73 (codified as amended at 29 U.S.C. § 216(c)). Among other things, the Department "may bring an

action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages." 29 U.S.C. § 216(c). The filing of such an action terminates automatically an employee's private right of action. *Id.* Moreover, willful violation of the FLSA is a crime punishable by fine and imprisonment. § 216(a).

The threat of government enforcement is no "paper tiger." As detailed in recent congressional testimony, government enforcement of the FLSA has become increasingly robust. *See Examining Regulatory and Enforcement Actions Under the Fair Labor Standards Act, Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce*, 112th Cong. (2011) (*Enforcement Hearing*). For example, in federal fiscal year 2011 alone, the Department collected almost $225 million in back wages on behalf of more than 275,000 employees. *Id.* at 8 (statement of Nancy J. Leppink, Acting Wage & Hour Adm'r, U.S. Dep't of Lab.). The Department also recently hired hundreds of additional investigators and upgraded its equipment and technology to handle better complaints regarding possible FLSA violations. *Id.*

Accordingly, in endorsing as a perceived necessity continued litigation by private attorneys who no longer represent a client with a personal stake in the case's outcome, the Third Circuit's decision overlooks the powerful tool of government enforcement of the FLSA. To be sure, government enforcement of the FLSA is subject to its own potential limitations. *See, e.g., Enforcement Hearing* at 2 (statement of Rep. Walberg) (expressing concern regarding overzealous-

ness of Department's FLSA investigatory efforts). Government enforcement of the FLSA nonetheless helps ensure that truly meritorious FLSA cases are pursued in the best interests of employees and not the best interests of plaintiff's attorneys. If an employer's offer of complete relief to a private plaintiff is designed merely to mask a larger problem—a pejorative assumption apparently made by the Third Circuit's decision in this case without any evidentiary support—such efforts will likely prove ineffective after scores of additional employees come forward with similar claims, rendering the use of offers of judgment prohibitively expensive. Tellingly, although respondent asserted that thousands of her former colleagues throughout the United States possessed similar claims, not a single one has stepped forward in the almost three years since this case was filed.

CONCLUSION

For the reasons stated above and in the petitioners' brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-1059

IN THE

Supreme Court of the United States

GENESIS HEALTHCARE CORPORATION, *ET AL.*,
Petitioners,

v.

LAURA SYMCZYK,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a case becomes moot, and thus beyond the judicial power of Article III, when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff's claims.

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BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI—The Voice of the Defense Bar is the leading organization of defense attorneys and in-house counsel involved in the defense of civil litigation. DRI provides members with access to resources and

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. All parties consented to the filing of this brief. Copies of the letters granting consent have been filed with the Clerk.

tools to enable attorneys to provide high-quality, balanced, and excellent service to their clients and corporations. DRI is host to more than 25 substantive committees whose focus is to develop ongoing and critical dialogue about areas of practice. For the past 50 years, DRI has sought to enhance the skills, effectiveness, and professionalism of defense lawyers; anticipate and address issues germane to defense lawyers and the civil justice system; promote appreciation of the role of the defense lawyer; improve the civil justice system; and preserve the civil jury.

This case concerns whether a lawsuit can proceed—whether it continues as a "live" case or controversy within the judicial power of Article III—after the lone plaintiff loses any financial or other legally cognizable interest in any judgment that might result. The decision below answered that question in the affirmative, allowing a suit to proceed under the collective-action provision of the Fair Labor Standards Act (FLSA), 29 U.S.C. §216(b), even after the named plaintiff lost any personal stake in the outcome. Indeed, the decision allowed the case to proceed even though there is no longer *any* plaintiff with a personal stake of *any* sort in the outcome.

That ruling is of great concern to DRI, its members, and the clients they represent. DRI's members routinely defend clients in collective litigation across the Nation, whether under the FLSA, Rule 23, or other applicable provisions. DRI, moreover, regularly participates as *amicus* before this Court on issues relating to collective litigation and the need for uniform rules. See, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *McReynolds* (No. 12-113); *Comcast Corp.* v. *Behrend* (No. 11-864); *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011). DRI members and their clients also have an

ongoing interest in ensuring that federal courts confine themselves to their constitutionally appointed role of adjudicating live cases and controversies between actual parties.

In DRI's view, allowing lawsuits to proceed absent a live controversy between identifiable parties is inconsistent with the judiciary's role and is incompatible with fundamental fairness. It cannot be reconciled with the principle that actual plaintiffs, not clientless attorneys, should drive litigation. Accordingly, the judgment below should be reversed.

SUMMARY OF ARGUMENT

I. A. The decision below implicates Article III's most fundamental limit on federal judicial power—the requirement of a live case or controversy between parties with opposing personal stakes in the litigation. In case after case, this Court has recognized the critical role that limit plays in confining federal courts to acts of a judicial nature and preventing intrusion into the domain of the elected Branches. This Court, moreover, has stressed that the requirement of a live controversy must be satisfied throughout the case—from the day the complaint is filed until the judgment becomes final. If a case is no longer live or the parties cease to have a legally cognizable interest in the outcome, the case is moot; the court lacks jurisdiction; and the suit can no longer proceed.

B. The decision below cannot be reconciled with those principles. The decision below found no dispute that respondent lost any concrete interest in this suit after petitioners made her an offer of judgment in full. Nor is there any other plaintiff in this action for whom the controversy remains live and concrete. To the contrary, the FLSA's collective-action provision makes clear that one cannot become an FLSA plaintiff except by affirmatively

opting in: "*No employee shall be a party plaintiff* to any such action," the FLSA provides, "*unless he gives his consent in writing to become such a party* and such consent is filed in the court in which such action is brought." 29 U.S.C. §216(b) (emphasis added). Here, no one has done so, and respondent lost her personal stake in the outcome of this litigation. As a result, the case is moot: The court could afford respondent no more than she already had been offered voluntarily; nor is there any other plaintiff for whom this suit can offer any meaningful relief.

The Third Circuit erred by allowing this plaintiffless suit to proceed nonetheless. The court rested its analysis on the theory that, despite the sole plaintiff's lack of a personal stake, other, unidentified *non-parties* might *later* decide (at some unknown point) to opt in and thereby breathe life back into the suit. But that theory cannot be reconciled with this Court's long tradition of requiring an actual, present, and ongoing case or controversy. Nor can it be reconciled with §216(b)'s text, which provides the exclusive mechanism for a non-party plaintiff to become a party to the suit.

II. A. The decision below is not supported by this Court's decisions in *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326 (1980), and *U.S. Parole Commission* v. *Geraghty*, 445 U.S. 388 (1980). In those cases, this Court allowed putative class representatives to appeal the denial of class certification after their own claims had become moot. The Court reasoned that, although the named plaintiffs lacked any continued personal stake in the merits of their lawsuits, they retained sufficient interests in the certification motions themselves. That reasoning is questionable in its own right. The interests *Roper* and *Geraghty* identified as sufficient are precisely

the sort of collateral byproducts of litigation that this Court has found insufficient to sustain federal jurisdiction in case after case since. In any event, respondent does not and cannot claim any such interest here. She has no economic interest in shifting litigation costs to other plaintiffs because petitioners offered to pay her costs, including attorney's fees, in full. And the FLSA's requirement that all plaintiffs must individually opt in to a collective action precludes any asserted entitlement to represent a class. Policy considerations about good collective-action practice cannot overcome those jurisdictional defects.

B. The absence of any plaintiff with a live personal stake in the merits of this case cannot be cured by the "relation back" doctrine. That doctrine allows judicial correction of erroneous decisions denying class certification by relating a later order certifying a class back to the date of the earlier denial it replaces. Relation back can prevent an action from becoming moot because class certification ensures that a live controversy remains even after the named plaintiff loses her personal stake in the outcome; the other members of the certified class still have theirs. But relation back cannot be invoked where the sole plaintiff's claim becomes moot *before* any decision on class certification, let alone before a certification motion has even been filed. Once the sole plaintiff loses her interest, there is no one left with the requisite personal stake. Invoking relation back is especially inappropriate in an FLSA case: The FLSA expressly provides that additional plaintiffs are considered to enter a collective action only on the date that they file their consent to opt in. As a result, their entry cannot be "related back" to some earlier time to manufacture a continuing and continuous controversy. The Third Circuit's contrary

conclusion transforms relation back in this context from a modest tool of judicial self-correction into a sweeping mechanism for asserting jurisdiction over moot actions that have lost the essential character of an Article III case or controversy.

ARGUMENT

I. THE DECISION BELOW EXPANDS THE FEDERAL JUDICIAL POWER BEYOND ACTUAL CASES AND CONTROVERSIES

The defining feature of the judicial power is that it is limited to live cases and controversies between parties with opposing personal stakes in the outcome—stakes that must exist throughout the duration of the suit. By allowing this plaintiffless lawsuit to proceed despite that feature, the Third Circuit circumvented a critical boundary on the judicial power.

A. Article III Requires A Live Controversy Between Parties With Personal Stakes In The Outcome

Article III of the U.S. Constitution limits the jurisdiction of federal courts to the resolution of "Cases" and "Controversies"—the sorts of disputes traditionally adjudicated by Anglo-American courts. See U.S. Const. art. III, § 2; *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 492-493 (2009). Because of that limitation on federal judicial authority, "Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them,' and confines them to resolving 'real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Lewis* v. *Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990) (quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971)). Limit-

ing the reach of the federal judiciary to actual cases or controversies prevents a federal court from issuing "a declaration of an abstract character" that benefits none of the parties before it. *Marye* v. *Parsons*, 114 U.S. 325, 329 (1885).

Those principles reflect our tripartite system of government and are critical to public acceptance and understanding of the judicial role. "Continued adherence to the case-or-controversy requirement of Article III maintains the public's confidence in an unelected but restrained Federal Judiciary." *Ariz. Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1442 (2011). "If the judicial power were 'extended to every question under the constitution,' Chief Justice Marshall once explained, federal courts might take possession of 'almost every subject proper for legislative discussion and decision.'" *Ibid.* (quoting 4 *Papers of John Marshall* 95 (C. Cullen ed. 1984)). But deciding "questions of law arising outside of cases and controversies would be inimical to the Constitution's democratic character." *Ibid.* By restricting the judiciary to "the traditional role of Anglo-American courts," the requirement of a live controversy between adverse parties preserves "'the proper—and properly limited—role of the courts in a democratic society.'" *Summers*, 555 U.S. at 492-493.

To satisfy the case-or-controversy requirement, litigants must "demonstrate a 'personal stake' in the suit." *Camreta* v. *Greene*, 131 S. Ct. 2020, 2028 (2011). The party invoking the court's authority must not merely have "suffered an injury in fact" that was caused by "the conduct complained of"; she must also show that the injury "will be redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992) (quotation marks omitted). Those requirements also ensure

that the controversy features "that concrete adverseness which sharpens the presentation of issues." *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983) (quotation marks omitted).

The live controversy must persist throughout the case. *Lewis*, 494 U.S. at 477. "[I]t is not enough that a dispute was very much alive when suit was filed." *Ibid.* Rather, the "case-or-controversy requirement subsists through *all stages* of federal judicial proceedings, trial and appellate." *Ibid.* (emphasis added); see also *United States* v. *Juvenile Male*, 131 S. Ct. 2860, 2864 (2011); *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997); *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975).

If a case ceases to be "alive" at any point during litigation, it can no longer proceed. *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998); see also *S. Spring Hill Gold Mining Co.* v. *Amador Medean Gold Mining Co.*, 145 U.S. 300, 301 (1892) (when "litigation has ceased to be between adverse parties, * * * the case * * * is not a real one"). The same is true where intervening circumstances deprive the plaintiff of a "'personal stake in the outcome' of the lawsuit." *Lewis*, 494 U.S. at 478 (quoting *Lyons*, 461 U.S. at 101); see, *e.g.*, *Spencer*, 523 U.S. at 7; *Preiser*, 422 U.S. at 401; *Mills* v. *Green*, 159 U.S. 651, 653 (1895). "Simply stated, a case is *moot* when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969) (emphasis added).

The requirement of a live controversy between parties with personal stakes in the outcome, like other justiciability doctrines, "state[s] fundamental limits on federal judicial power in our system of government." *Allen* v. *Wright*, 468 U.S. 737, 750 (1984). This Court has thus long held that a federal court "is not empowered to de-

cide moot questions or abstract propositions, or to declare * * * principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *California* v. *San Pablo & Tulare R.R. Co.*, 149 U.S. 308, 314 (1893). It is not merely that federal courts "lack jurisdiction to decide moot cases" in some technical sense. *Iron Arrow Honor Soc'y* v. *Heckler*, 464 U.S. 67, 70 (1983).[2] Rather, any effort to adjudicate such a matter would place them beyond their constitutionally assigned role. See, *e.g.*, *Spencer*, 523 U.S. at 7. Refusing to decide moot cases is thus "essential if federal courts are to function within their constitutional sphere of authority." *Rice*, 404 U.S. at 246.

B. Plaintiffless Lawsuits Like Respondent's Defy Article III

1. The decision below defies those settled principles. This lawsuit began as a one-plaintiff case, and should have ended when it became a no-plaintiff case. Respondent filed suit under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§207 and 216(b), alleging that her employer forced its employees to take automatic meal-break salary deductions. Pet. App. 2a-3a. Although the complaint was purportedly filed on her behalf and on behalf of all others similarly situated, the FLSA's collective-action provision expressly and categorically prohibits its courts from ascribing party status to unnamed plaintiffs. The FLSA declares: "*No employee shall be a party plaintiff* to any such action *unless he gives his consent in*

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[2] See also, *e.g.*, *Honig* v. *Doe*, 484 U.S. 305, 317 (1988); *id.* at 332-333 (Scalia, J., dissenting); *DeFunis* v. *Odegaard*, 416 U.S. 312, 316 (1974); *Preiser*, 422 U.S. at 401; *SEC* v. *Med. Comm. for Human Rights*, 404 U.S. 403, 407 (1972); *Powell*, 395 U.S. at 496 n.7; *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964); *Eisler* v. *United States*, 338 U.S. 189, 194 (1949) (Murphy, J., dissenting).

writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. §216(b) (emphasis added). Here, it is uncontested that no other employee gave the necessary consent to become a party to respondent's lawsuit. Pet. App. 3a. As a result, respondent was and remained the sole and exclusive plaintiff in the suit.

Two months into the suit, petitioners offered respondent a judgment under Federal Rule of Civil Procedure 68(a) that would have provided her with all of the relief she sought, including attorney's fees, costs, and expenses. Pet. App. 3a-4a. Although she declined to respond, she "did not dispute the adequacy of the offer as it pertained to the value of her individual claim." *Id.* at 20a n.9. Nor does respondent seek injunctive or declaratory relief that could affect her future working conditions; she does not work for petitioners. See *id.* at 3a. It is, as a result, undisputed that she has lost any personal stake in the outcome of this litigation.

The court below acknowledged that, "whether or not the plaintiff accepts the [Rule 68] offer, no justiciable controversy remains when a defendant tenders an offer of judgment under Rule 68 encompassing all the relief a plaintiff could potentially recover at trial." Pet. App. 14a. "Once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate, and a plaintiff who refuses to acknowledge this loses outright * * * because he has no remaining stake." *Rand* v. *Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991) (citation omitted). Respondent likewise conceded that "[a]n offer of complete relief will generally moot the plaintiff[']s claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation." J.A. 193. It is thus undisputed and indisputable in this case that, because the

sole plaintiff here no longer has a "'personal stake in the outcome' of the lawsuit," *Lewis*, 494 U.S. at 478, it no longer presents a case or controversy under Article III. "The controversy between the parties * * * clearly ceased to be 'definite and concrete' and no longer 'touch(es) the legal relations of parties having adverse legal interests.'" *DeFunis* v. *Odegaard*, 416 U.S. 312, 317 (1974) (quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240-241 (1937)). It therefore should have been dismissed as moot. *Ibid.*

In similar circumstances, this Court has recognized that, "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed." *Church of Scientology of Cal.* v. *United States*, 506 U.S. 9, 12 (1992) (quoting *Mills*, 159 U.S. at 653). The same is true when that event occurs before final judgment is even entered in district court. In both scenarios, the mootness doctrine prevents a court from issuing a decision that is without effect on the parties before it. Once respondent received a concededly complete offer of judgment, she ceased having "a still vital claim" for monetary relief. *Arizonans for Official English*, 520 U.S. at 67.

2. The Third Circuit, however, allowed the case to proceed on the theory that *other* persons might *later* decide to become parties, reviving the now-expired controversy. But the supposition that another plaintiff might *later* inject herself into the case cannot circumvent the requirements of Article III. "Federal courts must hesitate before resolving a controversy * * * on the basis of the rights of third persons not parties to the litigation." *Singleton* v. *Wulff*, 428 U.S. 106, 113 (1976). And when those non-parties possess the *only* rights to be adjudi-

cated, that hesitancy becomes a categorical bar: "[F]ederal courts are *without power* to decide questions that cannot affect the rights of litigants in the case before them." *Rice*, 404 U.S. at 246 (emphasis added); see also *DeFunis*, 416 U.S. at 316.

The *potential* for other persons to *later* decide to become parties does not change the result. "This Court does not sit here to try moot cases to solve a question which may never be raised by any party entitled to raise it." *Waite* v. *Dowley*, 94 U.S. 527, 534 (1877). In *Lewis*, for example, this Court dismissed plaintiff Continental Bank's challenge to a state law after statutory amendments rendered its challenge moot. The Court rejected Continental's argument that invalidating the law would provide relief to other banks, explaining that "the Article III question is not whether the requested relief would be nugatory as to the world at large, but whether *Continental* has a stake in that relief." *Lewis*, 494 U.S. at 479. The mere ability of others to opt in, moreover, "is not an indication of the intent to do so, and thus does not establish a particularized, concrete stake that would be affected by [a court's] judgment." *Ibid.*

The absence of any other party with a concrete, personal interest in this case could not be clearer. The FLSA's collective-action provision expressly provides the triggering event for when an additional person becomes a party to the suit: An employee can "become" a plaintiff in an FLSA case only by "giv[ing] his consent in writing." 29 U.S.C. §216(b). Before that event, the employee is a non-party to the suit. And as a non-party, he plainly has no interest in the outcome of the case. See *Cameron-Grant* v. *Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003), cert. denied *sub nom. Basil* v. *Maxim Healthcare Servs., Inc.*, 541 U.S. 1030 (2004).

The court of appeals did not suggest otherwise, but speculated that some other employee might give written consent and become a party later. Pet. App. 29a. In our adversarial system of justice, however, cases and controversies are between actual plaintiffs and actual defendants. The court of appeals, by contrast, dispensed with having an actual, identifiable plaintiff. Instead, it converted the complainant's side of the "v." into a mere placeholder that could be filled at some later date by an as-yet-unidentified individual of the plaintiff-side lawyers' choosing. But a lawsuit is not a blank dance card into which one can substitute a rotating roster of parties. It is supposed to be an actual dispute between existing parties. If there is no plaintiff, there is no lawsuit; if a new plaintiff comes forth, she should file a new lawsuit.

The decision in this case reflects an increasing tendency to treat lawsuits as having a life separate from the parties that bring them. The desire to do so in longstanding controversies may be understandable. This Court has recognized the "sunk costs" imposed on the judiciary once a "case has been brought and litigated." *Friends of Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191-192 & n.5 (2000). But there are no sunk costs here. The offer of judgment (including attorney's fees) was made years ago, just two months after respondent filed her complaint. Pet. App. 3a-4a; contrast *Laidlaw*, 528 U.S. at 191 ("[B]y the time mootness is an issue, the case has been brought and litigated, often (as here) for years."). And in any event, concern about "sunk costs does not license courts to retain jurisdiction over cases in which one or both of the parties plainly lack a continuing interest." *Laidlaw*, 528 U.S. at 192 (footnote omitted). The decision below cannot be reconciled with that principle. It should be reversed.

II. *ROPER* AND *GERAGHTY* DO NOT SUPPORT THE DECISION BELOW

In allowing respondent's suit to proceed, the court of appeals invoked two decisions in which this Court permitted putative class representatives to appeal the denial of class certification even after losing any personal stake in the merits of the litigation. See Pet. App. 15a, 17a-18a (quoting *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326 (1980); *U.S. Parole Comm'n* v. *Geraghty*, 445 U.S. 388 (1980)). Even in the class-action context, however, those decisions do not sweep as broadly as the court of appeals believed. Far less do they support federal jurisdiction in the present context of a putative FLSA collective action.

A. Neither *Roper* Nor *Geraghty* Affords Respondent Any Personal Stake In This Litigation

Over three decades ago, in two cases decided on the same day, this Court ruled that a putative class representative may appeal the denial of class certification even after his own individual claim becomes moot. *Roper*, 445 U.S. at 336; *Geraghty*, 445 U.S. at 404. In doing so, however, the Court did not abandon Article III's mandate that a litigant must have a personal stake in the litigation. Instead, the Court in each case identified economic and representative interests that the plaintiffs retained in the question of class certification itself, even though their interest in the underlying merits had evaporated. More recent decisions call into question whether the interests the Court identified in *Roper* and *Geraghty* should be sufficient to sustain federal jurisdiction. But even if they are, they cannot salvage respondent's case. She lacks even the collateral pecuniary and representative interests implicated in *Roper* and *Geraghty*.

1. *Respondent Lacks The Pecuniary And Representative Interests Recognized In* Roper *And* Geraghty

In *Roper*, the named plaintiffs sought to certify a class action seeking damages for alleged violations of the National Bank Act. 445 U.S. at 327-328. After the district court denied certification, the defendants tendered them full recovery; the district court subsequently entered judgment in their favor and dismissed the action. *Id.* at 329-330. This Court concluded that the plaintiffs could appeal the denial of their certification motion, even though their individual claims had been rendered moot. *Id.* at 333, 340. Similarly, in *Geraghty*, the Court concluded that a prisoner who brought a putative class action challenging parole release guidelines could appeal the denial of class certification even though he had been released from prison while the appeal was pending. 445 U.S. at 393-394, 404.

Essential to the Court's decision in both cases was its view that a "plaintiff who brings a class action presents two separate issues for judicial resolution"—the claim on the merits and a distinct "claim that he is entitled to represent a class." *Geraghty*, 445 U.S. at 402. Bifurcating the suits in that way, the Court concluded that a plaintiff who had "los[t] * * * a 'personal stake' in the *merits* of the litigation," could nevertheless "continue to press the *class certification claim*"—and only that claim—so long as he retained a sufficient personal stake in its resolution. *Id.* at 400, 402 (emphasis added); see *Roper*, 445 U.S. at 336.

The Court found that the plaintiffs in both cases retained a sufficiently concrete interest. In *Roper*, the Court held that the named plaintiffs "retained an economic interest in class certification." 445 U.S. at 333. In

particular, although the defendants had offered to pay the maximum amount of damages they could recover, *id.* at 329, the plaintiffs asserted a further "desire to shift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails," *id.* at 336. As to that interest, a successful appeal on class certification could provide relief. In *Geraghty*, the putative class representative did not seek damages and so could not claim an interest in paying for the litigation out of a class recovery. This Court concluded, however, that his asserted procedural "right to have a class certified" gave him an adequate personal stake to appeal the denial of class certification. 445 U.S. at 404.

Neither of those interests is present here. Unlike the plaintiffs in *Roper*, respondent has asserted no interest in sharing costs with other employees who might join her collective action. Nor could she: Petitioners offered to pay her costs, including attorney's fees, in full. Pet. App. 3a-4a. Respondent therefore has no personal stake in "allocating such costs among all [plaintiffs] who benefit from any recovery." *Roper*, 445 U.S. at 338 n.9.

Unlike the plaintiff in *Geraghty*, moreover, respondent can claim no entitlement to represent others in this suit. Congress deliberately designed the FLSA's collective-action mechanism to *distinguish* collective actions under the FLSA from class actions and to prevent a flood of representative litigation. The procedure for bringing additional plaintiffs into the case lies at the core of that distinction. When a class is certified under Rule 23, unnamed class members automatically become part of the case; they are bound by any resulting judgment unless they affirmatively opt out. See Fed. R. Civ. P. 23(c)(3)(B). Because certification turns on whether the named plaintiff has satisfied Rule 23's requirements, pu-

tative class representatives can colorably claim an "entitle[ment] to represent a class." *Geraghty*, 445 U.S. at 402.

A collective action under the FLSA is "a fundamentally different creature than the Rule 23 class action." *Cameron-Grant*, 347 F.3d at 1249. "No employee," the statute provides, "shall be a party plaintiff to any such action unless he" affirmatively *opts in* by "giv[ing] his consent in writing." 29 U.S.C. §216(b). Respondent's ability to conduct this litigation on behalf of others thus turned entirely on other persons' individual decisions whether to opt in, not on a court's determination whether to issue a certification order deeming those other persons parties to the action. Cf. *Allen*, 468 U.S. at 759 (plaintiff lacks standing to challenge injury attributable to "independent decisions" of third parties). "[I]n the absence of any opt-in plaintiffs," respondent did "not have a procedural right to represent a class." *Smith* v. *T-Mobile USA Inc.*, 570 F.3d 1119, 1122 (9th Cir. 2009).

The Third Circuit disputed none of that. The court acknowledged that the FLSA's "opt-in mechanism transforms the manner in which a named plaintiff acquires a personal stake in representing the interests of others." Pet. App. 25a. But the court dismissed that distinction as not providing "a compelling justification" for reining in this plaintiffless lawsuit. *Ibid.* The court did not find that respondent has some *other* personal stake in this litigation—or that she somehow acquired a personal stake in representing others in some different way. Instead, it concluded as a policy matter that defendants should not be allowed "to impede the advancement of a [putative] representative action." *Ibid.* The court claimed support from statements in *Roper* that allowing named plaintiffs to be "picked off" would "'frustrate the

objectives of class actions.'" *Id.* at 15a (quoting 445 U.S. at 339). But *Roper* did not allow such concerns to trump Article III. This Court *still* insisted that the plaintiff demonstrate a continuing personal stake in some aspect of the litigation. See *Roper*, 445 U.S. at 336. And it emphasized that federal courts' "jurisdiction is limited by [that] personal stake." *Ibid.* The Third Circuit's conclusion that it and the district court could continue to exercise jurisdiction over this case—without ever delineating what personal stake respondent retained in the litigation—cannot be reconciled with *Roper*, *Geraghty*, or the commands of Article III.

2. Roper *And* Geraghty's *Permissive Approach To Article III Merits Reconsideration, Not Extension*

Because *Roper* and *Geraghty* by their terms do not support the judgment below, respondent in effect seeks not an application of those precedents but their expansion. But *Roper* and *Geraghty* ought not be expanded. To the contrary, they have been so undermined by intervening cases as to warrant their reconsideration.

a. *Roper* held that named plaintiffs who were offered "the maximum amount that each could have recovered" from the defendant nevertheless "retained an economic interest in class certification" sufficient to allow them to appeal a denial of class certification. 445 U.S. at 329, 333. That interest was the plaintiffs' "desire to shift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails." *Id.* at 336. The Court described "the prospect of reducing their costs of litigation, particularly attorney's fees, by allocating such costs among all members of the class" as a "significant benefit" to plaintiffs who bring class rather than individual actions. *Id.* at 338 n.9.

Attorney's fees undoubtedly can affect plaintiffs' pocketbooks after the underlying legal dispute has been resolved. But in case after case since *Roper*, this Court has concluded that "an interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes." *Vt. Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 773 (2000); see also *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("[A] plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit"); *Diamond* v. *Charles*, 476 U.S. 54, 69-71 (1986) (assessment of attorney's fees against a party does not give him standing to pursue the action on appeal). Those decisions gravely undermine *Roper*'s continued vitality.

In *Lewis* v. *Continental Bank Corp.*, for example, Continental opposed an order vacating the judgment below on mootness grounds because doing so "would deprive Continental of its claim for attorney's fees," which were "available only to a party that 'prevails' by winning the relief it seeks." 494 U.S. at 480. This Court rejected that argument, holding that "[t]his interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Ibid.* The Court explained that when "the only concrete interest in the controversy has terminated," courts must "be sure that mooted litigation is not pressed forward * * * solely in order to obtain reimbursement of sunk costs." *Ibid.* That admonition applies with even greater force in a case like *Roper*, where the "reimbursement of sunk costs" is sought *not* from the (formerly) opposing party but from non-parties whose interests are allegedly aligned with the plaintiff's. Such intramural financial squabbles cannot justify subjecting

defendants to the burdens of class litigation and exposing them to potentially massive liability at the sole behest of named plaintiffs they have already made whole.[3]

Roper's contrary holding rested in part on this Court's concern that, absent the class action's "fee-spreading incentive," attorney's fees "could exceed the value of the individual judgment" and "plaintiffs would be unlikely to obtain legal redress at an acceptable cost." 445 U.S. at 338 n.9. Such "policy considerations," *id.* at 340, however, justify rewriting Article III's requirements in the class-action context no more than anywhere else. To the extent that attorney's fees might unduly deter injured persons from seeking relief individually, Congress is fully capable of allowing successful plaintiffs to receive fee awards in addition to their recovery on the merits. It has already done so in the FLSA, among other contexts. See 29 U.S.C. §216(b).

b. In *Geraghty*, the named plaintiff did not seek damages; consequently, he could not claim even a pecuniary interest in paying for litigation costs from a class recovery. This Court nevertheless held that his asserted "right to have a class certified" provided a sufficient personal stake to allow him to appeal the denial of class certification. 445 U.S. at 404. But a claimed entitlement to serve as a class representative is also "merely a 'byprod-

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[3] Whether named plaintiffs will actually succeed in reducing their litigation costs is also wholly speculative. Even assuming a class action will be certified and prevail on the merits (both questionable propositions), litigating a lawsuit on a class basis is almost certain to increase costs exponentially, as class notice, expert reports, claims processes, and other class-action accoutrements become necessary. When all is said and done, there is no reason to assume that the named plaintiffs' share of those massive costs will amount to less than the unshared costs incurred when a Rule 68 offer is made early in the case.

uct' of the suit itself." *Vt. Agency*, 529 U.S. at 773. It is a purely "procedural claim," *Geraghty*, 445 U.S. at 402, that has no existence or meaning independent of the suit. Since *Geraghty*, this Court has made clear that the enforcement of asserted "procedural rights" provides a basis for federal jurisdiction only where "the procedures in question are designed to protect some threatened concrete interest * * * that is the ultimate basis of [the plaintiff's] standing." *Lujan*, 504 U.S. at 573 n.8; see *id.* at 572. While a procedural interest in representing a class may normally be designed to protect an underlying concrete interest—*i.e.*, the substantive relief sought in the class action—it cannot serve that function where the plaintiff concededly no longer has any personal stake in the merits of the litigation. It is a procedural right asserted solely for its own sake—a claimed entitlement to be appointed captain of a ship that the named plaintiff cannot board.

That claimed entitlement, moreover, is exceedingly ethereal. A named plaintiff's bid to represent a class after losing any stake in the outcome is doomed to failure. Although this Court has held that a designated class representative who loses her personal stake may *continue* to represent a class, it has also cautioned that "[a] litigant *must be a member of the class* which he or she seeks to represent *at the time the class action is certified.*" *Sosna* v. *Iowa*, 419 U.S. 393, 403 (1975) (emphasis added). A named plaintiff with no remaining claim cannot be a "member" of a class asserting live claims. At the very least, that plaintiff's claims will not be "typical of the claims * * * of the class," precluding her appointment as

class representative for that reason as well. Fed. R. Civ. P. 23(a)(3).[4]

B. Respondent's Suit Cannot Be Salvaged By The "Relation Back" Doctrine

Once respondent's claim became moot—with no other plaintiff in her suit—no live controversy remained; the "litigation * * * ceased to be between adverse parties." *S. Spring Hill*, 145 U.S. at 301. That lapse of an Article III case or controversy obligated the district court to dismiss the action as moot.

The Third Circuit ruled that it could avoid that result by applying "the relation back doctrine." Pet. App. 28a. It held that respondent should be allowed to file a motion for "conditional certification" of her putative collective action. *Id.* at 28a-29a. If the motion were "made without undue delay," the court continued, the district court

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[4] The FLSA, moreover, was deliberately designed to bar collective actions headed by persons with no live claims of their own. As originally enacted, the statute gave both "employees *and their 'representatives'* the right to bring actions to recover amounts due under the FLSA." *Hoffmann-LaRoche, Inc.* v. *Sperling*, 493 U.S. 165, 173 (1989) (emphasis added). Representatives who brought suit did not need to possess claims themselves. *Ibid.* The result was "a flood of suits under the FLSA," most "involv[ing] very large allegations of liability." *Arrington* v. *Nat'l Broad. Co.*, 531 F. Supp. 498, 500 & n.5 (D.D.C. 1982) (citing 93 Cong. Rec. 2087-2088 (1947) (Sen. Donnell)). Congress fixed the problem in 1947. Because of "excessive litigation spawned by plaintiffs lacking a personal interest in the outcome, the representative action by plaintiffs not themselves possessing claims was abolished." *Hoffmann-LaRoche*, 493 U.S. at 173. The result was to "limit[ ] private FLSA plaintiffs to employees who asserted claims in their own right and free[ ] employers of the burden of representative actions." *Ibid.* Allowing respondent to pursue this action on behalf of other employees, despite having no live claim herself, would condone precisely the sort of "representative" FLSA suit Congress sought to abolish.

would "relate the motion back to the filing of the initial complaint." *Id.* at 28a. And if the motion were later granted and "at least one other similarly situated employee opts in, then defendants' Rule 68 offer of judgment would no longer fully satisfy the claims of everyone in the collective action." *Id.* at 29a. At that point, the court concluded, "the proffered rationale behind dismissing the complaint on jurisdictional grounds would no longer be applicable." *Ibid.* By creating the fiction that respondent filed a motion to certify *before* she lost her personal stake in the case, the court of appeals attempted to fulfill Article III's case-or-controversy requirement.

The court derived that holding from *Weiss* v. *Regal Collections*, 385 F.3d 337, 348 (3d Cir. 2004), a class-action case holding that a Rule 68 offer made *before a class certification motion is filed* does not moot the case. There, the court held that a post-offer motion will be treated "as though it had been filed contemporaneously with the filing of the class complaint," bypassing the plaintiff's loss of his personal stake in order to let the class action "'play out.'" Pet. App. 19a (quoting *Weiss*, 385 F.3d at 348). *Weiss* itself was an extension of decisions holding that, when a tender of full recovery is made *while a class certification motion is pending*, a subsequent order certifying the class will relate back to the date the motion was filed, again to negate the impact of an intervening event that would otherwise moot the case. See *id.* at 18a-20a, 23a n.12; *Weiss*, 385 F.3d at 346 (citing cases). Those decisions, in turn, were "exten[sions] [of] *Geraghty*," *Weiss*, 385 F.3d at 346, where this Court addressed relation back when a plaintiff loses his personal stake *after a decision on class certification*, 445 U.S. at 407 n.11.

But those efforts to extend the relation-back doctrine under *Geraghty* fundamentally misconceive that doctrine. The relation-back principle allows courts to relate a corrected decision *granting* class certification back to the date of an earlier, erroneous decision *denying* certification. It cannot be invoked where the sole plaintiff's claim becomes moot *before* a class certification decision has been made. It is even less appropriate in collective actions under the FLSA: The FLSA's collective action provision unambiguously provides that additional plaintiffs are deemed to enter the case only on the date they file their consent to opt in. Relation back cannot be used to circumvent that clear statutory command.

1. *Relation Back Cannot Prevent Mootness When The Named Plaintiff Loses A Personal Stake Before A Decision On Class Certification*

As petitioners note (Pet. 19-22), the courts of appeals have divided over when relation back can prevent an uncertified class action from becoming moot. Some, including the Third Circuit, hold that the doctrine applies even where no certification motion has been filed at the time the named plaintiff loses his personal stake in the litigation; if the plaintiff later files a motion "without undue delay," that motion will relate back to the date of the initial complaint (when the plaintiff's claim was still live). See *Weiss*, 385 F.3d at 348. Other circuits hold that the plaintiff must at least have filed a certification motion before the event that would otherwise render the case moot. See *Damasco* v. *Clearwire Corp.*, 662 F.3d 891, 895 (7th Cir. 2011). Both of those approaches are wrong. Article III and relation-back principles both indicate that mootness is avoided only if there has been a *decision* on

class certification before the named plaintiff's personal stake in the merits disappeared.

a. That was the situation in *Geraghty*. There, the named plaintiff's claim became moot after the district court denied his motion for class certification, while his appeal from the denial was pending. 445 U.S. at 390. This Court held that his personal stake in having the class certified allowed him to pursue the appeal, even though his interest in the litigation's merits had lapsed. *Id.* at 400, 402-404; see pp. 14-16, *supra*. That holding, however, addressed only half of the jurisdictional question. The Court also had to assure itself that a live controversy remained with respect to the merits, notwithstanding the named plaintiff's departure from that battlefield.

On that issue, the Court invoked its earlier decision in *Sosna*. *Sosna*, it observed, held that "mootness of the named plaintiff's individual claim *after* a class has been duly certified does not render the action moot." *Geraghty*, 445 U.S. at 397. Upon class certification, *Sosna* ruled, "the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by" the plaintiff. *Sosna*, 419 U.S. at 399. Even if the named plaintiff's own claim later disappears, the other class members retain their personal stakes in the merits. A continuing "controversy [thus] may exist * * * between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot." *Id.* at 402. Because the other class members were brought into *Sosna* before the named plaintiff's claim became moot, there was never a point in that case when no party had a live claim.

Geraghty used the relation-back doctrine to extend *Sosna* to cases where the named plaintiff's claim becomes moot after an erroneous *denial* of class certification. It held that, "when a District Court erroneously denies a procedural motion, which, if correctly decided, would have prevented the action from becoming moot, an appeal lies from the denial and the corrected ruling 'relates back' to the date of the original denial." *Geraghty*, 445 U.S. at 406-407 n.11. The Court explained that "[i]f a class had been certified by the District Court, mootness of respondent Geraghty's personal claim would not have rendered the controversy moot" under *Sosna*. *Id.* at 394. "[A]n erroneous *denial* of a class certification should not lead to the opposite result." *Ibid.* Such a rule would let a class action's mootness turn irrevocably on one judge's fallible view about whether a class should be certified. Instead, *Geraghty* recognized an opportunity for judicial self-correction through relation back. If a district court's refusal to certify a class is later found to have been mistaken, the corrected ruling certifying the class will be deemed to have been entered at the time of, and in lieu of, the earlier denial, *nunc pro tunc*. That merely remedies a collateral effect of an erroneous judicial ruling; it reverses not only the erroneous failure to certify, but also the mootness that would have been avoided if certification had been properly granted in the first instance. Cf. *United Gas Improvement Co.* v. *Callery Props., Inc.*, 382 U.S. 223, 229 (1965) ("a court[ ] can undo what is wrongfully done by virtue of its order"). In the eyes of the law, the named plaintiff's claim thus became moot only *after* the class attained separate legal status and additional persons with live claims were brought before the Court. As in *Sosna*, there was always someone with a personal stake in the merits of the case on the plaintiff side of the "v."

The same cannot be said when the named plaintiff's individual claim becomes moot *before* the district court rules on class certification. To the contrary, *Geraghty* explained that, "[i]f the named plaintiff has no personal stake in the outcome *at the time class certification is denied*, relation back of appellate reversal of that denial *still would not prevent mootness* of the action." 445 U.S. at 407 n.11 (emphasis added). In those circumstances, there is an unavoidable gap between the named plaintiff's loss of his personal stake and other class members' assertion of their own. Mootness then is not a collateral consequence of an erroneous order that relation back can avoid: Even if a later order certifying the class were related back to the earlier denial, that would not alter the fact that the action became moot, and should have been dismissed, before the effective certification date.

b. The Third Circuit's expansive interpretation of "relation back" bears little resemblance to the modest corrective tool described in *Geraghty*. Whether in the class-action context or this one, that court's approach erroneously focuses on the certification *motion* rather than the certification *decision*. The Third Circuit's decision in *Weiss* was premised on treating a class certification motion filed after the named plaintiff lost his personal stake "as though it had been filed contemporaneously with the filing of the class complaint." Pet. App. 19a. Similarly, the court here purported to cure respondent's mootness problem by relating her later-filed motion for "conditional certification" "back to the filing of the initial complaint." *Id.* at 28a. But even assuming that the motion could relate back to the complaint, that still would not avoid mootness. *Geraghty*'s relation-back rule rests on the premise that the presence of a duly certified class prevents the named plaintiff's loss of a personal stake

from mooting the entire case. *Geraghty* therefore treats a later-certified class as though it was certified at the time of an earlier erroneous denial of certification, when the plaintiff's claim was still live. *See* pp. 25-26, *supra*.

The Third Circuit's approach lacks that important link. A certification motion, even if *actually* filed simultaneously with a class complaint, does not bring additional persons with live claims before the court. *Pretending* that the motion was filed with the complaint thus adds nothing to the jurisdictional calculus. "Relation back" is not an abracadabra that banishes mootness by its mere incantation. The event being related back must be of jurisdictional significance—such as adding new parties—and a mere motion to certify falls short.

Nor can mootness be circumvented by relating a later certification *decision* back to the filing of the certification *motion*. Some courts have held that such relation back is proper where a plaintiff is tendered full recovery while a class certification motion is pending. See, *e.g.*, *Damasco*, 662 F.3d at 895-896. The Third Circuit may have intended a similar arrangement here, such as relating a certification decision back to the certification motion and then relating the motion back to the complaint. But that approach defies precedent. *Geraghty* stated in no uncertain terms that relation back "still would not prevent mootness of the action" where the named plaintiff "has no personal stake in the outcome *at the time class certification is denied.*" 445 U.S. at 407 n.11 (emphasis added). That necessarily means that the plaintiff's loss of a personal stake while a certification motion is merely *pending* does moot the case. Backdating the certification decision to some earlier time when the named plaintiff still had a personal stake (whether that is the filing of the complaint

or the filing of the certification motion) is nothing more than an end-run around *Geraghty*'s clear rule.

Courts have claimed to find support for their distortion of *Geraghty*'s relation-back rule in two sentences of dictum in *Sosna*. See, *e.g.*, Pet. App. 17a (citing *Sosna*, 419 U.S. at 402 n.11); *Sandoz* v. *Cingular Wireless LLC*, 553 F.3d 913, 919 (5th Cir. 2008) (same). In holding that a previously certified class action could survive the named plaintiff's loss of a personal stake, *Sosna* reiterated the fundamental rule that a live controversy must exist "at the time the class action is certified." 419 U.S. at 402. In an accompanying footnote, however, the Court mused that there "*may* be cases" where named plaintiffs' claims become moot "before the district court can reasonably be expected to rule on a certification motion." *Id.* at 402 n.11 (emphasis added). "In such instances," the Court stated, "whether the certification can be said to 'relate back' to the filing of the complaint *may* depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review." *Ibid.* (emphasis added).

That tentative statement does not license judicial resurrection of any class action that becomes moot before a decision on certification. To the contrary, *Geraghty* made clear that *Sosna*'s dictum merely referred to the traditional "capable of repetition, yet evading review" exception to mootness. 445 U.S. at 398-399. That exception enables review of claims "*so inherently transitory* that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *Id.* at 399 (emphasis added); see also *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 52 (1991); *Gerstein* v. *Pugh*, 420 U.S. 103, 110 n.11 (1975). The suggestion that respondent's dam-

ages claim here was "inherently transitory" because petitioners could offer to pay it in full at any time drains that phrase of all meaning; *all* damages claims are "transitory" in that overbroad sense. Absent true ephemerality, mootness can be prevented only by "certification of a class *prior* to expiration of the named plaintiff's personal claim." *Geraghty*, 445 U.S. at 398 (emphasis added).

2. *Relation Back Cannot Be Extended To FLSA Collective Actions*

Even if it were possible to relate a later *class* certification decision back to the initial complaint to prevent mootness, that approach still could not be superimposed onto cases brought under the *FLSA's* collective-action provision.

The court of appeals' analysis rested heavily on equating the two. Its ruling that respondent's anticipated motion for "conditional certification" (and perhaps a subsequent grant of that motion) would relate back to her complaint, Pet. App. 28a-29a, mirrored the court's treatment of certification motions in class actions, see *id.* at 18a-19a. But FLSA collective actions are, by congressional design, *not* class actions. See pp. 16-17, 22 n.4, *supra*. Unlike certification in a Rule 23 class action, "conditional certification" in an FLSA collective action does not bring any additional persons before the court or otherwise give anyone else "a legal status separate from the interest asserted by" the plaintiff. *Sosna*, 419 U.S. at 399. Rather, as the court of appeals acknowledged, conditional certification "is only the district court's exercise of [its] discretionary power * * * to facilitate the sending of notice to *potential* class members." Pet. App. 12a (quotation marks omitted) (emphasis added). The FLSA is explicit that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to

become such a party and such consent is filed in the court." 29 U.S.C. §216(b). An order granting conditional certification therefore does not forestall mootness, even if it were to relate back to the initial complaint. Additional plaintiffs, with their own live claims, are not parties until they *affirmatively opt in* to the lawsuit; until that occurs, they cannot ensure that a live controversy survives extinguishment of the named plaintiff's personal stake in the outcome.

For the Third Circuit's "relation back" theory to work in the FLSA context, one cannot merely relate the conditional certification *motion* and the conditional certification *decision* back to the complaint. One would also have to relate opt-in plaintiffs' later *consent* back to the complaint as well. The statutory text, however, forecloses that approach: It provides that an action under the FLSA "*shall be considered to be commenced* in the case of any individual claimant" only on the "*date on which such written consent is filed.*" 29 U.S.C. §256(b) (emphasis added). Conversely, a claimant's suit may "be considered to be commenced * * * on *the date when the complaint is filed*" only if the claimant "is specifically named as a party plaintiff *in the complaint* and his written consent to become a party plaintiff *is filed on such date.*" *Id.* §256(a) (emphasis added). Relating subsequent opt-ins back to the date of the original complaint would flout those statutory commands.

"Mootness doctrine, and [courts'] consequent inability to render judgment on nice hypotheticals or advisory questions, supplies a significant portion of what distinguishes the role of the federal judge from that of the advisor or academic"—or advocate—"in our constitutional order." *Wyoming* v. *Dep't of Interior*, 587 F.3d 1245, 1250 (10th Cir. 2009). Courts improperly blur those lines

when they create novel and unanchored fictions to rescue moot cases that should otherwise be dismissed. Because the decision below does just that, it should be reversed.

CONCLUSION

The judgment of the Third Circuit should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-1059

IN THE

Supreme Court of the United States

GENESIS HEALTHCARE CORPORATION, ET AL.,
Petitioners,

v.

LAURA SYMCZYK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

No. 11-1059

GENESIS HEALTHCARE CORPORATION, ET AL.,
Petitioners,

v.

LAURA SYMCZYK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council (EEAC) respectfully submits this brief as *amicus curiae*. The brief supports the Petitioner and urges reversal of the decision below.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes approximately 300 major U.S. corporations that collectively employ roughly 20 million workers. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment practices and equal employment opportunity policies.

All of EEAC's members are employers subject to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201 *et seq.*, as amended, the Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d), as amended, and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, as amended, as well as other federal workplace protection and nondiscrimination laws. The fair and consistent implementation of these laws and regulations is of paramount concern to all employers, including EEAC's members. Equally important to its membership, however, is that it not be forced by the courts to endure the exorbitant costs of continued litigation even after extending to the plaintiff an offer of full relief. The question presented regarding whether an FLSA collective action may be maintained even after the named plaintiff no longer has a legally cognizable interest in the outcome of the case therefore is of great importance to EEAC.

EEAC seeks to assist the Court by highlighting the impact its decision will have beyond the immediate

concerns of the parties. Because of its experience in these matters, EEAC is well-situated to brief the Court on the relevant concerns of the business community and the significance of the case to employers.

STATEMENT OF THE CASE

Respondent Laura Symczyk was employed as a registered nurse by a subsidiary of Petitioner Genesis HealthCare Corporation. On December 4, 2009, approximately two years after her employment ended, Symczyk filed an action in the U.S. District Court for the Eastern District of Pennsylvania on behalf of herself and others similarly situated alleging that Genesis had automatically deducted meal periods from her pay, regardless of whether she actually took a meal break, in violation of Sections 7 and 16(b) of the Fair Labor Standards Act, 29 U.S.C. §§ 207 & 216(b). Pet. App. 3.

On February 18, 2010, Genesis answered Symczyk's complaint and simultaneously presented her with an offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure in the amount of $7,500.00, representing compensation for alleged unpaid wages, attorney's fees, costs and expenses. Pet. App. 4 (footnote omitted). Although the offer of judgment fully satisfied her claims, Symczyk neither accepted nor rejected it. Pet. App. 42-43.

Genesis subsequently filed a motion to dismiss for lack of subject matter jurisdiction, on the ground that Symczyk's failure to respond to the offer of judgment deprived her of any personal stake or legally cognizable interest in the litigation. Pet. App. 5. The district court ultimately agreed, concluding that: (1) Symczyk was presented with an offer of judgment that fully satisfied her claims; (2) no other individu-

als opted into the collective action; and (3) no motion for conditional certification had been filed. Pet. App. 42-43. The district court noted that while other courts have allowed FLSA collective actions to proceed after the named plaintiff had been deprived of any ongoing stake in the litigation due to an offer of judgment, all of those cases involved situations where other individuals had already opted-in to join the collective action, or the plaintiff had already filed a motion for conditional certification under 29 U.S.C. § 216(b). Pet. App. 41-42.

The district court also acknowledged the distinction between class actions under Rule 23 of the Federal Rules of Civil Procedure, in which class members are presumptively covered by the lawsuit unless they opt out, and collective actions under FLSA Section 16(b), in which members "must take the affirmative step of opting in to the action to be a part of the action and bound by its terms." Pet. App. 39 (quoting *Darboe v. Goodwill Industries of Greater New York & Northern New Jersey, Inc.*, 485 F. Supp. 2d 221, 223-24 (E.D.N.Y. 2007)) (internal quotation marks omitted). In recognizing this critical difference between the Rule 23 class action device and FLSA collective actions, the district court affirmed the basic principle that in the latter, "'the named plaintiff is deemed to represent himself only.'" Pet. App. 39 (quoting *Darboe*, 485 F. Supp. at 224).

The Third Circuit reversed, relying heavily on this Court's decisions in *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980) and *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980). Pet. App. 1-29. Despite acknowledging that an offer of full relief generally will moot a plaintiff's claims, it nonetheless reasoned that the issue of class certifica-

tion relates back to the filing of the complaint, such that even after the named plaintiff's claims have been exhausted, the case may proceed. Pet. App. 14-26 (citing *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004)).

The Third Circuit dismissed the differences between Rule 23 class actions and FLSA collective actions as largely "conceptual," concluding that the mootness inquiry cannot be "predicated inflexibly on whether any employee has opted in to an action at the moment a named plaintiff receives a Rule 68 offer," as "employers would have little difficulty preventing FLSA plaintiffs from attaining the 'representative' status necessary to render an action justiciable notwithstanding the mooting of their individual claims." Pet. App. 23-25 (quoting *Sandoz*, 553 F.3d at 920). It found that the collective action's opt-in mechanism changed only the manner in which a named plaintiff obtains a representational interest in others and did not act as a bar to representation in the first place. Pet. App. 25. Genesis then petitioned for a writ of certiorari, which this Court granted on June 25, 2012.

SUMMARY OF ARGUMENT

Article III of the United States Constitution limits the subject matter jurisdiction of federal courts to actual cases and controversies "capable of resolution through the judicial process." U.S. Const. art. III, § 2; *Flast v. Cohen*, 392 U.S. 83, 95 (1968). This doctrine "functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000).

The plain language of the FLSA provides that collective action plaintiffs represent themselves—and only themselves—until such time as other individuals give their written consent to participate in the litigation. In the absence of that consent, and in particular in the absence of even an *attempt* to obtain their consent, the only legally sound and fair application of Article III is that a collective action be inextricably tied to the named plaintiff's personal right to obtain any relief from the litigation.

While this Court's decisions in *Roper* and *Geraghty* contemplate the continuation of a class action even where the named plaintiff no longer has any personal stake in the litigation, neither addresses the issue in the context of a FLSA collective action where, as here, no motion for conditional certification has ever been filed and no other known plaintiffs exist.

Once a named plaintiff's claims have been rendered moot, and where no other plaintiffs have been identified, the only individual with any conceivable interest in pressing forward is the plaintiff's attorney, for purely financial reasons. Permitting the use of judicial resources in this manner would discourage settlement and facilitate protracted litigation, an outcome that is at odds with the well-established public policy, reaffirmed repeatedly by this Court, favoring voluntary resolution of disputes. To the contrary, such a rule would provide ample incentive for plaintiff's attorneys to file every single-plaintiff FLSA suit as a collective action, knowing that regardless of the outcome of their own client's claims, they still will have an opportunity to pursue additional plaintiffs with the court's assistance. The far more reasonable course of action is to reverse the Third Circuit's decision so as to ensure that employ-

ers can offer a settlement aimed at fully compensating employees with legitimate claims, while at the same time preserving the rights of those hypothetical plaintiffs, who may still file suit either on their own or collectively after the named plaintiff's claims have been resolved.

ARGUMENT

I. A PLAINTIFF WHO HAS BEEN PRESENTED WITH AN OFFER OF FULL RELIEF NO LONGER HAS A PERSONAL STAKE IN THE LITIGATION AND THUS CANNOT PURPORT TO REPRESENT THE INTERESTS OF UNKNOWN PLAINTIFFS IN A COLLECTIVE ACTION

A. There Is No Live Case Or Controversy In A FLSA Collective Action After A Named Plaintiff Relinquishes Her Personal Stake In The Litigation And No Other Plaintiffs Have Opted In

In the Third Circuit's view, even after a named plaintiff's personal stake in a collective action is rendered moot, courts nonetheless must allow the litigation to continue, despite the fact that the plaintiff never moved for conditional certification and there are no other known plaintiffs associated with the action. If permitted to stand, the Third Circuit's decision would eviscerate Article III's requirement that courts adjudicate only live cases and controversies, and therefore should be reversed.

Article III of the United States Constitution limits the subject matter jurisdiction of federal courts to actual cases and controversies "capable of resolution through the judicial process." U.S. Const. art. III,

§ 2; *Flast v. Cohen*, 392 U.S. 83, 95 (1968). "Article III denies federal courts the power to decide questions that cannot affect the rights of litigants in the case before them, and confines them to resolving real and substantial controversies admitting of specific relief through a decree of a conclusive character ...." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-478 (1990) (citations and internal quotations omitted).

As this Court observed in *Continental Bank*, "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate .... It is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the Court of Appeals. *Id.* Rather, the parties to the dispute "must continue to have a personal stake in the outcome of the lawsuit." *Id.* It logically follows, then, that a collective action brought under the FLSA should be dismissed as moot once a plaintiff no longer has any legally cognizable interest in the outcome of the case and no other plaintiffs remain with claims capable of resolution.

Relying in part on the Court's decisions in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980) and *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), the Third Circuit below nonetheless concluded that a FLSA collective action may proceed even in the absence of a live controversy, on the theory that other, unknown plaintiffs may exist and should have an opportunity to come forward and participate in the action. While this Court in limited circumstances has sanctioned continued litigation even after an individual's personal stake in the action has ended, those cases were decided under Rule 23 of the Federal Rules of Civil

Procedure, not the FLSA. *See, e.g., Geraghty*, 445 U.S. at 403-04 (decision to deny Rule 23 class certification to class of federal prisoners was a procedural judgment reviewable on appeal, where *after* class certification had been denied the named plaintiff's personal claim in the litigation was rendered moot by virtue of the fact that he was no longer incarcerated); *Roper*, 445 U.S. at 335-40 (judgment in favor of named plaintiffs entered *after* the denial of class certification under Rule 23 did not render moot named plaintiffs' ongoing stake in the litigation, as denial of class certification was a procedural judgment that they had a right to appeal as individuals, apart from their status as class representatives).

In *Geraghty*, for example, where the named plaintiff sought and was denied Rule 23 class certification, this Court held that "an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied." 445 U.S. at 404 (footnote omitted). Among other things, the Court was persuaded by the fact that the individuals whom the named plaintiff sought to represent had actively moved to be substituted or intervene as named parties after the plaintiff's personal stake in the litigation had ended, which served as evidence of an ongoing, live controversy. *Id.* at 396. The Court made clear, however, that its holding was "limited to the appeal of the denial of the class certification motion." *Id.* at 404.

Likewise, in *Roper*, the Court held that the denial of class certification under Rule 23 is an appealable, procedural judgment, which is not rendered moot by a post-denial judgment. 445 U.S. at 339. It explicitly declined to address "what, if any, are the named

plaintiffs' responsibilities to the putative class *prior* to certification ...." *Id.* at 340 n.12 (emphasis added). These cases stand for the basic principle that the denial of Rule 23 class certification is an appealable *procedural* judgment. They are not applicable outside of the class action context. *Geraghty*, 445 U.S. at 404.

B. Unlike In Rule 23 Class Actions, Plaintiffs Represent Only Themselves In FLSA Collective Actions

The Third Circuit's misguided reliance on *Roper* and *Geraghty* ignores the fundamental basis upon which the Court arrived at those decisions, to wit, that in Rule 23 class actions, named plaintiffs have two separable and distinct interests: (1) their personal stake in the litigation; and (2) their responsibility "to represent the collective interests of the putative class." *See Roper*, 445 U.S. at 331; *Geraghty*, 445 U.S. at 402 ("A plaintiff who brings a class action presents two separate issues for judicial resolution. One is the claim on the merits; the other is the claim that he is entitled to represent a class"). Critical differences between Rule 23 class actions and FLSA collective actions, however, preclude the possibility that a named plaintiff in a collective action could purport to represent a "class" of unknown plaintiffs that have yet to come forward.

Unlike employment class actions filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, or the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, class-based claims brought under the FLSA are not subject to the procedural requirements of Rule 23. Among other things, Rule 23 requires that plaintiffs seeking class certification show that the case is suitable for class treatment in

that (1) it is large enough ("numerosity"); (2) there are questions of law or fact common to the class ("commonality"); and (3) that the named plaintiffs are typical of those of the class as a whole ("typicality"). Fed. R. Civ. P. 23. In contrast, a plaintiff asserting class-based claims under the FLSA is permitted to bring a collective action on behalf of all similarly situated employees, *i.e.*, those who, like the plaintiff, were entitled to receive, but allegedly were denied, the minimum wage or overtime pay. 29 U.S.C. § 216(b). Further, unlike a Rule 23 class action, in which the plaintiff presumptively represents a class of individuals from the commencement of the litigation, in a collective action the named plaintiff represents no one; other plaintiffs must affirmatively "opt-in" to the litigation. *Id.*

As originally drafted, the FLSA did permit representative actions, allowing an individual to "designate an agent or representative to maintain such action for and in behalf of all employees similarly situated." *Martino v. Mich. Window Cleaning Co.*, 327 U.S. 173, 175 n.1 (1946) (quoting Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 16(b), 52 Stat. 1060, 1069 (1938)). Citing concerns that the FLSA had resulted in "wholly unexpected liabilities," 52 Stat. 1060 (1938), with the potential to "bring about financial ruin of many employers," *id.*, Congress soon revised the statute to eliminate "representative actions" and require that parties affirmatively "opt-in" to a collective action. Portal-to-Portal Act of 1947, ch. 52, §§ 1(a), 5(a), 61 Stat. 84, 87 (codified as amended at 29 U.S.C. § 251(a), 29 U.S.C. § 216(b)). As this Court observed in *Hoffmann-La Roche, Inc. v. Sperling*, "[t]he relevant amendment was for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own

right and freeing employers of the burden of representative actions." 493 U.S. 165, 173 (1989). *See also, e.g., Smith v. T-Mobile USA, Inc.*, 570 F.3d 1119, 1123 (9th Cir. 2009) (holding that a collective action plaintiff "has no independent right to represent a class that would preserve a personal stake in the outcome for jurisdictional purposes," but rather "his right to represent a class depends entirely on whether other plaintiffs have opted in"); *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003) (holding that even if similarly situated individuals exist, a named plaintiff in a collective action has "no right to represent them" until "other plaintiffs affirmatively opt into the class by giving written and filed consent").

While the Third Circuit below acknowledged that the differences between Rule 23 and the FLSA altered the "conceptual mootness inquiry," Pet. App. 24 (quoting *Sandoz*, 553 F.3d at 920), it nonetheless declined to afford those differences any controlling weight, concluding instead that the FLSA does not prevent the named plaintiff "from fulfilling a representative role." Pet. App. 22 n.11. The difference between individual and representative actions is not merely "conceptual," however. While it may be true, as the Third Circuit suggests, that class actions and collective actions share the common goal of resolving numerous claims at one time, thereby reducing the potential burden and potential costs associated with litigating such claims individually, the fact remains that Congress intentionally chose two different means of achieving those goals. To the extent that the decision below ignores that reality, it is erroneous and should be reversed.

II. PERMITTING LITIGATION TO PROCEED IN THE ABSENCE OF ANY REMAINING SUBSTANTIVE OR PROCEDURAL ISSUES WOULD FRUSTRATE THE WELL-ESTABLISHED PUBLIC POLICY FAVORING SETTLEMENT OVER PROTRACTED LITIGATION

Affirming the Third Circuit's decision will only encourage costly and acrimonious litigation, a result that is fundamentally inconsistent with this Court's jurisprudence and sound public policy favoring the voluntary resolution of claims. In *Hoffman-La Roche*, the Court decided the narrow question of whether and to what extent district courts may play a role in the ADEA collective action notification process.[2] 493 U.S. at 169. There, unlike the present case, plaintiff had introduced into evidence letters from over 400 individuals seeking to be included in the litigation and sought the court's assistance in ensuring proper notification of the collective action. *Id.* at 168. While the Court held that courts are permitted *some* discretion in prescribing the terms and conditions of communication from a named plaintiff to the potential collective action members, it emphasized that this discretion was limited and must not rise to the level of *soliciting* claims, concluding that "courts must take care to avoid even the appearance of judicial endorsement of the merits of the action." *Id.* at 174. The Court must exercise that discretion here

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[2] The ADEA specifically adopts the FLSA's collective action mechanism. 29 U.S.C. § 626(b). While there is no statutorily-mandated notification procedure, it is common for plaintiffs to seek the court's assistance in sending formal notifications to potential collective action members, thereby allowing them to "opt-in" to the litigation.

and not craft a decision that would permit trial courts to solicit countless additional FLSA, EPA, and ADEA plaintiffs.

By permitting litigation to continue in the absence of a named plaintiff or even a motion for conditional certification, plaintiff's attorneys effectively would be transformed into de facto "representatives," thus enabling precisely the type of litigation Congress attempted to eliminate from the FLSA in 1947.

Both this Court and Congress repeatedly have reaffirmed the strong public policy favoring the settlement of statutory employment claims. Section 118 of the Civil Rights Act of 1991, for example, urges employers and employees alike to use out-of-court methods, including settlement negotiations, to resolve disputes arising under federal employment and labor laws:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including *settlement negotiations*, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

Pub. L. No. 102-166, § 118, codified as 42 U.S.C. § 1981 note (Alternative Means of Dispute Resolution) (emphasis added). *See also, e.g., Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977) (favoring conciliation "whenever possible"); *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770-71 (1983) (voluntary compliance is an "important public policy" intended by Congress to be the "preferred means of enforcing Title VII") (citation omitted). Employers readily embrace this notion, preferring the certainty

of out-of-court settlement over the uncertainly of protracted litigation. This is particularly true of claims arising under statutes such as the FLSA, which does not require a showing of intent in order to establish liability.

If permitted to stand, the Third Circuit's decision would make it nearly impossible for employers to bring closure to FLSA collective actions through voluntary settlement of the named plaintiff's claims. It would be manifestly unjust to allow—let alone mandate—the "meter" to run on such claims after the only known plaintiffs' interests have expired and no motion for conditional certification has been filed. Furthermore, the Court's decision likely will have significant implications well beyond the FLSA context. *See, e.g.*, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626(b) (incorporating the FLSA's collective action provisions).

In addition, the Third Circuit's decision has the undesirable effect of loosening the FLSA's already generous collective action conditional certification standards, under which a party must show only that individuals are "similarly situated." 29 U.S.C. § 216(b). That standard stands in stark contrast to the stringent Rule 23 class certification standards that apply to most other class-based litigation in the federal courts, *see Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S. Ct. 2541 (2011), and the Court must take care not to make the filing of collective actions even more attractive by allowing plaintiff-less plaintiff's attorneys to reap a windfall of fees at employers' expense.

The far more simple and practical solution is to reverse the decision below, which would ensure that employers can make legitimate settlement offers

aimed at fully compensating the named plaintiff and finally resolving the contested claim, while preserving the rights of unknown plaintiffs.

CONCLUSION

Accordingly, the *amicus curiae* Equal Employment Advisory Council respectfully requests that the decision below be reversed.

Respectfully submitted,

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GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORP.,

Petitioners,

v.

LAURA SYMCZYK,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR THE IMPACT FUND, ASIAN LAW CAUCUS, ASIAN PACIFIC AMERICAN LEGAL CENTER OF SOUTHERN CALIFORNIA, BET TZEDEK, DISABILITY RIGHTS CALIFORNIA, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER, PUBLIC ADVOCATES, INC., PUBLIC COUNSEL, THE PUBLIC INTEREST LAW PROJECT, PUBLIC JUSTICE, P.C., AND THE WESTERN CENTER ON LAW AND POVERTY AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Can defendants, in a case brought as a collective action under section 16(b) of the Fair Labor Standards Act, render the case moot by making an offer of judgment that is not accepted and that offers relief only to the representative plaintiff?

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The Impact Fund, Asian Law Caucus, Asian Pacific American Legal Center, Bet Tzedek, Disability Rights California, the Lawyers' Committee for Civil Rights Under Law, the Legal Aid Society – Employment Law Center, Public Advocates, Public Counsel, The Public Interest Law Project, Public Justice, P.C., and the Western Center on Law and Poverty ("Amici"), by consent of the parties, submit this brief amicus curiae and respectfully urge this Court to affirm the Third Circuit's decision below.[1]

INTERESTS OF THE AMICI

Amici curiae are public interest organizations representing the interests of workers, consumers, persons with disabilities, and civil rights plaintiffs, particularly those of modest means. Amici advocate for the interests of those who often cannot safeguard their rights without access to the class action device. Amici submit this brief in support of respondent Laura Symczyk to emphasize that the arguments advanced by petitioners Genesis HealthCare Corporation, *et al.*, and their amici, if accepted by this Court, would

[1] Pursuant to Sup. Ct. R. 37.6, Amici certify that no counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Only Amici, or their counsel, made a monetary contribution to this brief's preparation and submission. The parties have filed blanket consents to the filing of amicus briefs.

undermine the ability of their clients to vindicate their rights.

The Impact Fund is a nonprofit foundation that provides funding, training, and co-counsel to public interest litigators across the country. It is a California State Bar Legal Services Trust Fund Support Center, providing assistance to legal services projects throughout the State. The Impact Fund is counsel in a number of major civil rights class actions, including cases challenging employment discrimination, lack of access for those with disabilities, and violations of fair housing laws.

Asian Law Caucus ("ALC") was founded in 1972 as the nation's first Asian-American legal organization dedicated to defending the civil rights of Asian Americans and Pacific Islander communities. A member of the Asian American Center for Advancing Justice, ALC has a long history of protecting low-wage immigrant workers through direct legal services, impact litigation, community education, and policy work. ALC has a strong interest in this case because class and representative actions are key tools that the ALC uses to vindicate the rights of clients and community members who are too vulnerable to bring suit to enforce their rights on their own.

Asian Pacific American Legal Center of Southern California ("APALC") is a nonprofit organization dedicated to advocating for civil rights, providing legal services and education, building coalitions to positively influence and impact Asian

Americans, Native Hawaiians, and Pacific Islanders, and creating a more equitable and harmonious society. As part of its civil rights work, APALC has served hundreds of workers and aided them in bringing claims for unpaid wages and other employment law violations. Since its founding in 1983, APALC has worked on numerous cases and policy initiatives to promote immigrants' rights and workers' rights, including the rights of workers to pursue their claims collectively through the class and collective action mechanisms. APALC is a member of the Asian American Center for Advancing Justice.

Bet Tzedek was established in 1974 and provides free legal services to seniors, the indigent, and disabled persons in Los Angeles County in the areas of housing, benefits, consumer fraud, and employment. Bet Tzedek's Employment Rights Project assists low-wage and immigrant workers through a combination of litigation, legislative and administrative advocacy, and community education. Bet Tzedek clients work in industries marked by low pay and frequent violations of minimum labor standards, and include day laborers, domestic workers, and employees in the garment, construction, car wash, restaurant, and janitorial industries.

Disability Rights California is a nonprofit agency established to protect, advocate for, and advance the human, legal, and service rights of Californians with disabilities. Since 1978, Disability Rights California has provided essential legal services to people with disabilities. In the last year, Disability

Rights California provided legal assistance on more than 24,000 matters to individuals with disabilities. Disability Rights California represents people with disabilities in class actions where the amounts of individual recovery are often too small to make individual litigation economically feasible, but where those amounts matter a great deal to the low-income class members with disabilities.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee is dedicated, among other goals, to eradicating all forms of workplace discrimination affecting racial and ethnic minorities, women, individuals with disabilities, and other disadvantaged populations. Since the passage of the Civil Rights Act of 1964, the Lawyers' Committee has relied on the class action mechanism, embodied in Rule 23 of the Federal Rules of Civil Procedure, as an essential tool for combating unlawful discrimination, particularly in employment.

The Legal Aid Society – Employment Law Center ("Legal Aid") is a nonprofit public interest law firm whose mission is to protect, preserve, and advance the workplace rights of individuals from

traditionally underrepresented communities. Since 1970, Legal Aid has represented plaintiffs in cases involving the rights of employees in the workplace, particularly those cases of special import to communities of color, women, recent immigrants, individuals with disabilities, the LGBT community, and the working poor. Legal Aid often brings cases for low-wage workers as class actions. Legal Aid has appeared in discrimination cases on numerous occasions both as counsel for plaintiffs, *see, e.g., Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); and *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (counsel for real party in interest), as well as in an amicus curiae capacity. *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *United States v. Virginia*, 518 U.S. 515 (1996). Legal Aid's interest in preserving the protections afforded employees by this country's antidiscrimination laws is longstanding.

Public Advocates, Inc. is one of the oldest nonprofit public interest law firms in the nation. Throughout its history, the firm's mission has been to challenge the persistent, underlying causes and effects of poverty and discrimination and to work for the empowerment of the poor and people of color. Among its many strategies, Public Advocates represents clients in class action impact litigation and has an interest in seeing the federal rules, including Rules 23 and 68, properly applied so as not to constrain enforcement of civil rights.

Public Counsel is the largest nonprofit law firm of its kind in the nation. It is the public interest arm of the Los Angeles County and Beverly Hills Bar Associations and is also the Southern California affiliate of the Lawyers' Committee for Civil Rights Under Law. Established in 1970, Public Counsel is dedicated to advancing equal justice under law by delivering free legal and social services to indigent and underrepresented children, adults, and families throughout Los Angeles County. Last year, its staff of fifty-nine attorneys and forty-four support staff (including five social workers), together with more than 5,000 volunteer lawyers, law students and legal professionals, directly assisted over 32,000 low-income children, youth, adults, and families, as well as eligible community organizations, and served more than 736,000 children and adults through its Impact Litigation Project. The value of the free legal services that Public Counsel provided during 2011 is conservatively estimated at more than $88 million. Class litigation is a regular part of Public Counsel's litigation docket.

The Public Interest Law Project is a nonprofit state litigation and advocacy support center for California legal services and public interest law programs. Its mission is to provide these local programs with the capacity to engage in law reform efforts that will preserve and increase the rights and economic well-being of indigent and lower-income families in California. One of the services it provides to local programs is the ability to bring class action litigation

when such a strategy presents the best option for advancing or protecting the interests of the program's clients.

Public Justice, P.C. is a national public interest law firm dedicated to pursuing justice for the victims of corporate and governmental abuses. Public Justice specializes in precedent-setting and socially significant cases designed to advance consumers' and victims' rights, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. Public Justice regularly represents employees and consumers in class actions, and its experience is that the class action device is often the only meaningful way that individuals can vindicate important legal rights.

The Western Center on Law and Poverty is the oldest and largest state support center for all of California's neighborhood legal services programs. The Western Center has frequently represented low income plaintiffs in statewide class actions, such as *Katie A. v. Bonta*, 481 F.3d 1150 (9th Cir. 2007) (Medicaid EPSDT program requires states to assure that children actually receive necessary mental health services) and *Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994) (Secretary of HHS's waiver of statutory requirements in approving AFDC cuts is invalid under the APA because of failure to consider harm to recipients). The Western Center's ability to litigate these important cases would be jeopardized if defendants

were able to moot class cases by offering individual relief to named plaintiffs.

SUMMARY OF THE ARGUMENT

Respondent's brief addresses why an unaccepted Rule 68 offer to a named plaintiff does not moot her individual claim or the claims of similarly-situated employees in a collective action brought under the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b). Amici submit this brief to underscore the importance of the well-settled precedent of this Court, *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), which rejected the use of an offer of judgment to "pick off" named plaintiffs in a case brought pursuant to Federal Rule of Civil Procedure 23.

Numerous Courts of Appeals have correctly applied *Roper* to preclude defendants from using Rule 68 offers, either before or after the filing of the certification motion, to moot class claims.[2] Consistent with this Court's decisions in *Sosna v. Iowa*, 419 U.S. 393 (1975) and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), class certification is deemed to relate back to the filing of the class complaint.

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[2] *See, e.g., Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (9th Cir. 2011); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239 (10th Cir. 2011); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913 (5th Cir. 2008); *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004).

Thus, the timing of the certification is irrelevant for Article III purposes.

Roper and its progeny reflect the twin goals of protecting the integrity of the class action mechanism and safeguarding the interests of absent class members. Rule 23 establishes a carefully-regulated procedure that permits the named plaintiffs to prepare, under the supervision of the district court, the substantial evidentiary record necessary for the class certification motion. Allowing a defendant to use Rule 68 to artificially manufacture mootness at any stage of the case would disrupt this process and thwart the purposes underlying the class action mechanism.

The risk posed by this litigation tactic is greatest in cases where the class action device is most essential – those involving claims with a monetary value too small to justify an individual federal lawsuit. Suits brought by consumers, civil rights plaintiffs, and low-wage workers frequently involve such negative value claims. The class device is intended to allow such plaintiffs "to pool claims which would be uneconomical to litigate individually." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985). If defendants could effectively prevent such cases from ever reaching the certification stage, by mooting out one representative after another involuntarily, the vindication of important rights will be entirely frustrated.

ARGUMENT

I. A RULE 23 ACTION IS NOT EXTINGUISHED BY THE MOOTNESS OF THE NAMED PLAINTIFF'S INDIVIDUAL CLAIM

In *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), the Court held that an unaccepted offer of judgment to the named plaintiffs did not moot a Rule 23 class action. The Court reached this result even though the district court had denied class certification and entered judgment in favor of the named plaintiffs over their objections. *Id.* at 329-30.

Roper identified the range of "interests to be considered when questions touching on justiciability are presented in the class-action context." *Id.* at 331. First, courts must consider the named plaintiffs' interests: "their personal stake in the substantive controversy and their related right as litigants in a federal court" to use Rule 23 class actions as a tool to "pursue their individual claims." *Id.* A separate interest, however, is the distinct "responsibility of named plaintiffs to represent the collective interests of the putative class." *Id.* The Court underscored that class actions implicate "the rights of putative class members as potential intervenors, and the responsibilities of a district court to protect both the absent class and the integrity of the judicial process by monitoring the actions of the parties before it." *Id.* While the Court recognized the relevance of these "interrelated" and "diverse" interests in determining the Article III implications in a Rule 23 class action, it resolved the question, in light of the specific facts of

the case, on the basis of the private economic interest of the named plaintiffs in obtaining class certification and thereby sharing costs. *Id.* at 331-32.

Roper emphasized the important role of class actions in enabling plaintiffs to bring cases as "private attorney[s] general" when they normally would be financially precluded from doing so. *Id.* at 338.

> The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

Id. at 339. Allowing class claims to be mooted "simply because the defendant has sought to 'buy off' the individual private claims of the named plaintiffs would be contrary to sound judicial administration." *Id.* Such conduct "frustrate[s] the objectives of class actions" and "invite[s] waste of judicial resources by stimulating successive suits brought by others claiming aggrievement." *Id.*

In *United States Parole Commission v. Geraghty*, 445 U.S. 388, 404 (1980), the companion case to *Roper*, this Court held that even where the named plaintiff's claim has expired, he can retain a personal stake in representing the class in order to appeal the denial of class certification. The Court explained that

the purpose of the personal stake requirement was "to assure that the case is in a form capable of judicial resolution" with "sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions." *Id.* at 403. It held that "these elements can exist with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired." *Id.* "The question whether class certification is appropriate remains as a concrete, sharply presented issue." *Id.* Because the named plaintiff in *Geraghty* continued to advocate his right to have a class certified, the personal stake in representing the class sufficed "to assure that Article III values are not undermined." *Id.* at 404.

Roper and *Geraghty* are rooted in this Court's earlier decision in *Sosna v. Iowa*, 419 U.S. 393 (1975), the seminal case concerning the mootness rule in class actions. *Sosna* established that unnamed class members had legal interests separate from that of the named plaintiff, which survived the mooting of her individual claims once the class was certified. *Id.* at 399. The *Sosna* Court explained that class certification should relate back to the filing of the complaint if mootness arises before certification can be achieved:

> There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to 'relate

> back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.

Id. at 402 n.11. This Court clarified further in *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976), that it was not necessary for a case to present an issue capable of repetition yet evading review to survive the mootness of the named plaintiff's claim. The unnamed class members must, however, have "'a personal stake in the outcome of the controversy'" assuring "'concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions.'" *Id.* at 754-55 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

In *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), this Court applied the same reasoning to a case in which class certification had yet to be considered when plaintiffs' claims became moot. There, the named plaintiffs filed their class certification motion after the expiration of their claims.[3] In other words, even though the named plaintiffs' individual

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[3] *See* Respondent McLaughlin's Brief on the Merits, *County of Riverside v. McLaughlin*, No. 89-1817, 1990 WL 513119, at *3, *18 (U.S. Dec. 19, 1990) (demonstrating that motion for class certification was filed after expiration of named plaintiffs' claims and nearly "two months after their original complaint was filed"); *see also McLaughlin*, 500 U.S. at 52.

claims were no longer viable at the time they filed the motion to certify the class, the district court heard the motion and granted it. This Court approved these actions, finding that the district court "retained jurisdiction indefinitely." *Id.* at 49. "That the class was not certified until after the named plaintiffs' claim had become moot does not deprive [this Court] of jurisdiction." *Id.* at 52.[4]

The "relation back" doctrine follows from this Court's precedents regarding the resolution of Article III questions. The party invoking federal jurisdiction must support each of the standing requirements with the same kind and degree of evidence at the successive stages of litigation as any other matter on which a plaintiff bears the burden of proof. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Therefore, "general factual allegations of injury resulting from the defendant's conduct" will suffice to establish

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[4] The named plaintiff must, of course, have Article III standing at the time the suit is initiated. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). However, if jurisdiction and standing are satisfied at the outset of the case, the replacement of a named plaintiff thereafter is treated as a case management issue under Rule 23. "[R]eplacement of a class representative may become necessary if, for example, the representative's individual claim has been mooted or otherwise significantly affected." Fed. Judicial Ctr., Manual for Complex Litigation § 21.26 (4th ed. 2012). "Replacement also may be appropriate if a representative has engaged in conduct inconsistent with the interests of the class or is no longer pursuing the litigation." *Id.* The district court has the authority to substitute class representatives in such cases.

Article III standing at the pleading stage, "for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support [a contested] claim." *Id.* (internal quotation marks omitted). If standing is later questioned, the court has jurisdiction to determine its own jurisdiction. *See Rosado v. Wyman*, 397 U.S. 397, 403 & n.3 (1970); *United States v. United Mine Workers of Am.*, 330 U.S. 258, 291 (1947). In a class action, the interests of the class are presumed to exist from the inception of the case based on the allegations of class-wide injury. The certification motion is the mechanism for determining whether the Rule 23 requisites are satisfied. This Court has recognized that determination of class certification may be "'logically antecedent' to Article III concerns." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612 (1997)). Once the court has certified the class, the existence of a class with a live "Case" or "Controversy" relates back to the filing of the complaint.[5]

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[5] Article III permits courts to bridge similar time gaps during which the continuing existence of a "Case" or "Controversy" may be in question because a party named in the pleadings ceases to exist or loses standing. These circumstances include, for example, the time it takes to substitute an executor or other party with standing when a plaintiff dies; to revive a dissolved corporate party; to substitute a public officer who sues or is sued in an official capacity and subsequently ceases to hold office; or to substitute a new plaintiff with the same or similar claims when the plaintiff loses standing. *See, e.g.*, Sup. Ct. R. 35 (relating to substitution of deceased parties and nonabatement of actions

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Under this Court's precedents, then, the timing of a Rule 23 motion to certify the class is not dispositive of the Article III question. When class claims are alleged, federal courts retain jurisdiction over the class controversy and the eventual certification decision "relates back" to the filing of the complaint "to preserve the merits of the case for judicial resolution." *McLaughlin*, 500 U.S. at 52; *see Swisher v. Brady*, 438 U.S. 204, 213-14 n.11 (1978); *Sosna*, 419 U.S. at 402.

II. THE CIRCUITS HAVE APPLIED THIS COURT'S PRECEDENTS TO PREVENT THE USE OF OFFERS OF JUDGMENT TO MANUFACTURE MOOTNESS IN RULE 23 ACTIONS

All of the circuits to consider the issue have relied on this Court's precedents in concluding that a Rule 68 offer will not moot a Rule 23 action and that, once achieved, class certification relates back to the filing of the complaint. "[W]here a defendant makes a

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against public officers who die, resign, or otherwise cease to hold office); Fed. R. Civ. P. 25; Fed. R. App. P. 43 (relating to substitution of parties); *see also* Fed. R. Civ. P. 21 (permitting district courts to drop or add parties "at any stage of the action and on such terms as are just"). This Court itself has had occasion to substitute new parties when the standing of the existing parties was in doubt in a case before it. *Mullaney v. Anderson*, 342 U.S. 415, 416-17 (1952) (granting motion to substitute parties with Article III standing in view of special circumstances before the Court).

Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint." *Weiss v. Regal Collections*, 385 F.3d 337, 348 (3d Cir. 2004); *see also Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091-92 (9th Cir. 2011); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1250 (10th Cir. 2011); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 919-21 (5th Cir. 2008) (using "relation back" doctrine in FLSA case).

Thus, the Third, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits have held that a Rule 68 offer of judgment will not moot a case in which a class certification motion is already pending, even if it has not yet been decided. *See Pitts*, 653 F.3d 1081; *Lucero*, 639 F.3d 1239; *Carroll v. United Compucred Collections, Inc.*, 399 F.3d 620 (6th Cir. 2005); *Weiss*, 385 F.3d 337; *Lusardi v. Xerox Corp.*, 975 F.2d 964, 975 (3d Cir. 1992); *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1051 (5th Cir. Unit A July 1981); *Susman v. Lincoln Am. Corp.*, 587 F.2d 866, 870 (7th Cir. 1978). The Third, Ninth, and Tenth Circuits have reached the same conclusion in cases where the offer is made so early that the named plaintiff could not be expected to have filed a class certification motion.[6] *Pitts*,

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[6] In fact, no Court of Appeals has held that an unaccepted Rule 68 offer can moot the claim of a plaintiff seeking to represent a Rule 23 class. The only appeals court decision finding that a settlement had been accomplished over the plaintiff's refusal

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653 F.3d at 1091-92; *Lucero*, 639 F.3d at 1245-47; *Weiss*, 385 F.3d at 347-48. The Third Circuit followed the same logic in this case, holding that an offer to the named plaintiff in a collective action made before the plaintiff moves for collective certification does not moot a case. Pet. App. 3. Rather, "'[a]bsent undue delay in filing a motion for class certification . . . the appropriate course is to relate the certification motion back to the filing of the class complaint.'" Pet. App. 16 (quoting *Weiss*, 385 F.3d at 348). It correctly observed that the relation back doctrine "has evolved to account for calculated attempts by some defendants to short-circuit the class action process." Pet. App. 18.

These decisions recognize the dangers posed by the defense tactic employed here. Endorsement of that tactic would allow defendants to pay off the few potential class representatives who come forward, retain the gains from presumptively unlawful conduct, and "effectively ensure that claims that are too economically insignificant to be brought on their own would never have their day in court." *Pitts*, 653 F.3d at 1091 (citing *Zeidman*, 651 F.2d at 1050). Allowing offers of judgment to moot class actions prior to certification will "contraven[e] one of the primary purposes of class actions – the aggregation of numerous similar (especially small) claims in a single

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to accept an offer relied on the peculiar provisions of state law that governed an offer made while the case was pending in state court prior to removal. *Damasco v. Clearwire Corp.*, 622 F.3d 891 (7th Cir. 2011); *see* discussion *infra* at pp. 19-21.

action." *Weiss*, 385 F.3d at 345. Moreover, allowing defendants to avoid class treatment would waste judicial resources by encouraging unnecessary litigation. *Id.* at 345 (citing *Roper*, 445 U.S. at 339). As the Seventh Circuit explained in *Susman*, "[i]f the class action device is to work, the courts must have a reasonable opportunity to consider and decide a motion for certification." 587 F.2d at 870.

The Courts of Appeals have not "restrict[ed] application of the relation-back doctrine only to cases involving *inherently* transitory claims" since it is the defendant's tactic that threatens to make the class claims transitory in practical effect. *Pitts*, 653 F.3d at 1091; *see also Weiss*, 385 F.3d at 347. Even though such cases are not time sensitive themselves, they are still "'acutely susceptible to mootness' in light of [the defendant's] tactic of 'picking off' lead plaintiffs" with a Rule 68 offer to avoid a class action. *Pitts*, 653 F.3d at 1091 (quoting *Weiss*, 385 F.3d at 347). "[A] claim transitory by its very nature and one transitory by virtue of the defendant's litigation strategy share the reality that both claims would evade review." *Id.*

The Seventh Circuit stands alone in holding that, before a certification motion has been filed, the mooting of the named plaintiff's claim moots the class action. *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011); *see also Holstein v. City of Chicago*, 29 F.3d 1145 (7th Cir. 1994). *Damasco* acknowledged the buy-off problem but proposed that plaintiffs "move to certify the class at the same time that they file their

complaint," an impractical and ineffective solution. 662 F.3d at 895-96; *see also supra* note 6.

First, as noted, it is the filing of the class complaint, not the filing of a class certification motion, that has Article III significance under this Court's jurisprudence. Whether mootness of the named plaintiff's claim occurs before or after the motion is filed is irrelevant. Second, requiring the named plaintiff to file the complaint and the class certification motion simultaneously would create unnecessary and disruptive motion practice. A premature class certification motion would in all but the rare case lack the substantial evidentiary foundation necessary to satisfy Rule 23 and would almost invariably fail. Indeed, Rule 23 was amended in 2003 precisely to avoid a too hasty certification process. *See* discussion *infra* Part III.

To solve this problem, the *Damasco* court suggests a further unworkable solution: once the premature certification motion is filed, plaintiffs should then "ask the district court to delay its ruling to provide time" for discovery. 662 F.3d at 896. In other words, plaintiffs are advised to file a patently inadequate "shell" motion with the complaint, then seek a stay of that motion and, if granted, conduct discovery. Some months later, plaintiffs are to file the "real" motion that will be properly framed based upon the evidence obtained and/or the intervening substantive motions. Elevating form over substance, the *Damasco* approach would strip district courts of the ability to engage in proper case management by requiring them

to conduct the pointless evaluation of a proxy certification motion and the inevitable motion for stay to permit discovery. This "solution" is a prescription for inefficiency and invites a waste of judicial resources.

III. PERMITTING THE USE OF RULE 68 OFFERS PRIOR TO CLASS CERTIFICATION TO CREATE MOOTNESS WOULD FRUSTRATE THE PURPOSES OF RULE 23

The use of a Rule 68 offer as a procedural trump card to moot class claims would undermine the ability of the named plaintiffs and the district court to safeguard the rights of unnamed class members and to manage the case effectively. *See Ortiz*, 527 U.S. at 858 (noting that "Rule 23 requires protections . . . against inequity and potential inequity at the pre-certification stage"). While class members are not bound by the results of the litigation until the class is certified, *Smith v. Bayer*, 131 S. Ct. 2368 (2011), Rule 23 ensures that their interests are protected in the pre-certification period. That task will be made more difficult if a new named plaintiff must step up to represent the class each time defendants' "buy off" tactic is successfully deployed. Eventually, the ranks of those willing to come forward will be exhausted and the harm to the class will remain unremedied. Rule 68 offers to named plaintiffs are, thus, at odds with the purpose and function of Rule 23.

A. Rule 68 Offers Disrupt the District Court's Oversight of the Pre-Certification Period

In making a motion for class certification, plaintiffs are required to marshal the factual record necessary to satisfy Rule 23 prerequisites. The federal rules, and particularly the 2003 amendment to Rule 23(c)(1)(a), establish a process by which district courts actively oversee the litigation during the pre-certification period. Because this period now typically involves discovery and substantive motion practice, the interval between the filing of the complaint and the certification can be quite lengthy. As a result, there will be far more opportunities for mootness to arise "before the district court can reasonably be expected to rule on a certification motion." *Sosna*, 419 U.S. at 402 n.11. Allowing Rule 68 offers to pick off named plaintiffs would present an irreconcilable threat to this well-ordered process and, as this Court recognized in *Roper*, interfere with sound judicial administration.

The certification motion determines the scope of the class, defines the class claims and defenses, and dictates the process for notice to the class. Fed. R. Civ. P. 23(c). Rule 23(d) confers broad authority on district courts to issue orders to "determine the course of proceedings" in a class action. Fed. R. Civ. P. 23(d); *see* Advisory Committee Notes to Rule 23, 1966 Amendments (district courts should "consider how the proceedings are to be arranged in sequence, and what measures should be taken to simplify the proof and

argument").[7] Significant discovery and pre-trial motion practice, under the supervision of the district court, are typically required before the class certification motion may be filed.[8] Fed. Judicial Ctr., Manual for Complex Litigation §§ 21.133, 21.141, 21.142 (4th ed. 2012).

Rule 23(c), which prescribes the timing of the class certification motion, was amended in 2003 to provide additional time for this pre-certification discovery and motion practice. "The requirement that the court determine whether to certify a class 'as soon as practicable after commencement of an action' [was] replaced by requiring determination 'at an early practicable time.'" Advisory Committee Notes to Rule 23, 2003 Amendments.[9] The Rules Committee decided

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[7] During the pre-certification period, as throughout the litigation, "a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974)).

[8] Courts routinely allow a period for jurisdictional discovery and motion practice, even though their jurisdiction is in doubt and may later be found not to exist. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978).

[9] An empirical study by the Federal Judicial Center of four federal districts found that, in 75% of the cases, the time from the filing of the complaint to the filing of a motion to certify ranged from 6.5 months to more than 16.3 months. *See* Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, Fed. Judicial Ctr., Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 26-36 (1996).

the change was necessary to reflect "prevailing practice" and "capture[ ] the many valid reasons that may justify deferring the initial certification decision." *Id.*

> Time may be needed to gather information necessary to make the certification decision. . . . [D]iscovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. . . . Other considerations may affect the timing of the certification decision. The party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified. Time may be needed to explore designation of class counsel under Rule 23(g), recognizing that in many cases the need to progress toward the certification determination may require designation of interim counsel. . . .[10]

Id.

The time needed to prepare the certification motion reflects that "Rule 23 does not set forth a mere

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[10] Thus, local rules that specify a short period in which the plaintiff must file a motion to certify the class are inconsistent with the amended rule's "emphasis on the parties' obligation to present the court with sufficient information to support an informed decision on certification." Manual for Complex Litigation § 21.133; *see also* Federal Judges' Pocket Guide to Class Actions III.A (stating that district courts "should feel free to ignore local rules calling for specific time limits; they appear to be inconsistent with the federal rules and, as such, obsolete").

pleading standard." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). This Court has repeatedly affirmed the need for "actual, not presumed, conformance" with the elements of Rule 23, and directed district courts to "probe behind the pleadings" and conduct a "rigorous analysis" to determine if the elements of Rule 23 have been satisfied. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160-61 (1982). "A party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart*, 131 S. Ct. at 2551. The class certification inquiry may require an investigation into the underlying merits of the action to ascertain compliance with Rule 23. *Id.* at 2551-52; *see Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184-86 (2011).

To fulfill these requirements, plaintiffs must proffer substantial evidence to satisfy Rule 23 and that evidence will typically be in the control of the defendant (e.g., number of class members, nature of common policy or conduct, extent and nature of class-wide harm). Given the systemic nature of class action claims and the need to identify "common proof" that will determine whether class treatment is warranted, this discovery will often include statistical data or other electronically-stored information. Once the data is obtained, experts may be required to analyze and interpret this data, adding additional time to the

pre-certification schedule for the preparation of reports and the taking of expert depositions.

At the same time, the district court will often hear motions to test the pleadings. *See, e.g., Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (holding that district court's dismissal of putative class action at pleading stage was proper). Summary judgment motions brought to challenge the claims of the named plaintiffs also may be heard in advance of motions for class certification. District courts are tasked with managing this process in order to ensure efficient adjudication of class certification and the narrowing of issues.

This oversight will be entirely disrupted if defendants are free to "pick off" named plaintiffs with seriatim Rule 68 offers prior to class certification. In addition to the significant discovery and motion practice ordinarily required in a class action, the district court would oversee the equivalent of a judicial Whac-A-Mole game, hearing successive motions to dismiss based on mootness, followed by motions to amend to add or substitute plaintiffs, followed by discovery from each successor plaintiff, followed by motions for summary judgment against each new plaintiff. In the process, Rule 23 would be effectively stymied.

B. Rule 68 Offers Present a Particular Risk for Small Value Claims

Requiring the district court to address repeated claims of manufactured mootness would be wasteful

and would provide defendants with a procedural cudgel at odds with the purposes of Rule 23. This problem presents the greatest threat to the kinds of cases where class treatment is most warranted, i.e., negative value cases where each individual's claim may be insignificant compared to the cost of litigating it. *See Pitts*, 653 F.3d at 1091 (citing *Zeidman*, 651 F.2d at 1050); *Weiss*, 385 F.3d at 345.

Class actions make it economically possible for injured consumers, civil rights plaintiffs, and low-wage workers to pursue claims for relatively small damage amounts for wrongs that would otherwise go unremedied. This Court has repeatedly recognized that the class action mechanism provides an efficient means to aggregate and redress losses too small to warrant individual litigation. *Amchem*, 521 U.S. at 617 (noting that the "policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights") (internal quotation marks omitted); *Roper*, 445 U.S. at 339 (explaining that "aggrieved persons may be without any effective redress unless they may employ the class-action device"); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) (same).

If permitted to do so, defendants will pursue the economically wise course of eliminating a parade of named plaintiffs with small losses, debilitating even the most dedicated advocates, avoiding resolution of the class certification motion on its merits, and

retaining most of the financial gain from their alleged misconduct.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

GENESIS HEALTHCARE CORP., *ET AL.*,
Petitioners,

v.

LAURA SYMCZYK, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, *Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, *ET AL.*, IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Can defendants, in a case brought as a collective action under section 16(b) of the Fair Labor Standards Act (FLSA), render the case moot by making an offer of judgment that is not accepted and that offers relief only to the representative plaintiff?

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STATEMENT OF INTEREST

The **National Employment Lawyers Association (NELA)** is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 circuit, state, and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. [1]

The **National Employment Law Project (NELP)** is a nonprofit legal organization with over 40 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP's areas of expertise include the workplace rights of low-wage workers

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[1] Pursuant to Sup. Ct. R. 37.6, *Amici* submit that no counsel for any party participated in the authoring of this document, in whole or in part. In addition, no other person or entity, other than *Amici*, has made any monetary contribution to the preparation and submission of this document. Pursuant to Sup. Ct. R. 37.2, letters consenting to the filing of this Brief have been filed with the Clerk of the Court.

under federal employment and labor laws, with a special emphasis on wage and hour rights. NELP has litigated and participated as *amicus* in numerous cases addressing the rights of workers under the Fair Labor Standards Act and related state fair pay laws. Our national three-city survey, *Broken Laws, Unprotected Workers,* and its New York state counterpart show the dire conditions of jobs in these growth sectors.

NELP works to ensure that *all* workers receive the basic workplace protections guaranteed in our nation's labor and employment laws; this work has given us the opportunity to learn up close about job conditions around the country in the low-wage jobs where basic fair pay violations persist. These non-payments create terrible hardships for workers and their families, and reward employers who fail to play by the rules. These same workers face severe barriers to enforcing their rights to fair pay, making collective and class action mechanisms vital to upholding the wage floor. Most low-wage workers we work with and on behalf of could not enforce their rights to fair pay without the protection of collective action.

AARP is a nonpartisan, nonprofit organization with a membership that strives to enable people age 50+ to secure independence, choice and control in ways beneficial and affordable to them and to society as a whole. A significant percentage of AARP's members are in the workforce and the protections available to them under the Age Discrimination in Employment Act (ADEA) are of the utmost importance to their economic security and self-esteem. In addition to establishing the right to legal and equitable relief, the ADEA also provides for

private enforcement through collective actions under Section 16(b) of the FLSA, 29 U.S.C. 216(b). In a variety of ways, including legal advocacy as an *amicus curiae*, AARP supports the rights and protections afforded older workers under federal and state employment laws. Because the court's decision in this case may have a material impact on the rights and protections of older Americans under the ADEA it is of vital concern to AARP.

California Rural Legal Assistance Foundation (CRLAF) is a nonprofit legal services provider which advocates for the rural poor in California and promotes the interests of low-wage workers, particularly farm workers. Since 1986 CRLAF has recovered wages and other compensation for thousands of low-wage workers. CRLAF has served as counsel for plaintiffs in multiple cases involving FLSA collective actions on behalf of workers subjected to a variety of schemes intended to defraud them of the minimum wages, contract wages and overtime wages. CRLAF has litigated numerous workforce-wide and class cases for low-wage workers in both state and federal courts. CRLAF relies on the ability of workers to bring class and collective cases as this is often the only effective means to improving working conditions in agriculture and other low-wage industries.

The **D.C. Employment Justice Center (EJC)** is a nonprofit organization whose mission is to secure, protect, and promote workplace justice in the D.C. metropolitan area. EJC provides legal assistance on employment law matters to the working poor and supports a local workers' rights movement, bringing together low-wage workers and

advocates for the poor. Having served as counsel for low-wage workers in many cases brought under the FLSA, EJC has first-hand experience of the vital importance of the collective action process in remedying widespread abuse of low-income workers through the non-payment of wages. We have seen workers denied justice due to an offer of judgment made by a defendant as a tactic to avoid liability to the rest of the putative class. FLSA collective actions must be preserved and strengthened, so that all low-income workers can protect their rights.

The Legal Aid Society (The Society) is the oldest and largest provider of legal assistance to low-income families and individuals in the United States. The Society's Civil Practice operates trial offices in all five boroughs of New York City providing comprehensive legal assistance in housing, public assistance, and other civil areas of primary concern to low-income clients. The Society's Employment Law Unit represents low-wage workers in employment-related matters such as claims for unpaid wages, claims of discrimination, and unemployment insurance hearings. The Unit conducts litigation, outreach and advocacy projects designed to assist the most vulnerable workers in New York City, among them, workers who participate in wage and hour collective actions but who would not, for fear of retaliation, bring an action themselves.

SUMMARY OF THE ARGUMENT

"The case or controversy requirement is a constitutional imperative; however, the boundaries of Article III's dictates are notoriously murky." *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1242 (10th Cir. 2011) (*citing Flast v. Cohen*, 392 U.S. 83, 95 (1968)). *Amici* agree with Respondent that dismissal pursuant to an unaccepted Offer of Judgment prior to the Court having a reasonable opportunity to rule on collective action certification is inappropriate. We write to stress the practical, negative impact a ruling in Petitioner's favor will have on the ability of America's workers to seek redress for wage and hour violations.

First, Congress affirmatively granted workers the right to proceed collectively in enforcing their rights under the FLSA. This right to "maintain" an action on behalf of "others similarly situated" is critical to the FLSA's goals. A collective action protects workers from retaliation and encourages compliance with the FLSA.

Second, validating the "pick off" tactic attempted by Petitioners would encourage (and often require) repetitive litigation. Rather than simply being permitted to join an existing action, where common issues among employees with similar complaints are resolved in a single action, workers would be required to file a series of lawsuits, raising similar issues, *seriatim*. This runs counter to the purposes the Section 16(b) *and* Rule 68 (which is designed to limit litigation).

Third, private collective actions are the primary means for enforcement of the FLSA's substantive requirements. The purpose of a "private attorney

general" is to ensure enforcement of basic rights (such as the right to be paid) regardless of the whims of agency funding. Action by the Department of Labor touches a tiny fraction of America's employers. Collective actions fill that gap.

Because it is a vital part of the FLSA's comprehensive remedial scheme, the Court should reject Petitioners' effort to create a unilateral right for employers to opt-out of the collective action process by "picking off" an FLSA lead plaintiff.

ARGUMENT

I. The FLSA Is A Remedial Statute Designed To Empower Workers

Congress passed the FLSA in order to "correct and as rapidly as practicable to eliminate" detrimental labor conditions. 29 U.S.C.A. § 202(b) (West). Given its broad remedial purposes, this Court has "consistently construed the [FLSA] 'liberally to apply to the furthest reaches consistent with congressional direction.'" *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296 (1985) (quoting *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 207, 211 (1959)).

The collective action provision is integral to the FLSA's comprehensive remedial scheme and is a statutory right in and of itself. *See Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 60 (1st Cir. 2007) (the FLSA "statutorily created [an] interest in [collective] actions"). Collective actions empower workers by putting "directly into the hands of the employees who are affected by violation the means

and ability to assert and enforce their own rights[.]" 83 Cong.Rec. 9264 (1938) (statement of Rep. Keller).

The 1947 Portal-to-Portal Amendments to the FLSA did not alter the right of employees to bring representative suits on behalf of others similarly situated. It did "not repeal an existing provision of the FLSA so as to prohibit collective actions by an employee who is a real party in interest." 93 Cong. Rec. 2085 (1947). Rather, it prevented employees from designating uninterested third parties to bring suit on their behalf. While the collective action process requires those who wish to participate to affirmatively "opt-in," the right granted to a *plaintiff* employee—the right to "maintain an action" on behalf of others similarly situated—has remained unchanged since 1938. 29 U.S.C.A. § 216(b) (West).

II. Violations Of The FLSA Are Common

Collective action enforcement remains essential because wage and hour violations are common, particularly in low-wage sectors of our economy. *See generally, Winning Wage Justice: A Summary of Research on Wage and Hour Violations in the United States*, Nat'l Employment Law Project (January 2012) (compiling dozens of studies from across the country);[2] *and* Annette Bernhardt *et al.*, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, Center for Urban Economic Development at the University of Illinois-Chicago, Nat'l Employment

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[2] *Available at* http://nelp.3cdn.net/509a6e8a1b8f2a64f0_y2m6bhlf6.pdf (last visited Oct. 25, 2012).

Law Project & UCLA Institute for Research on Labor and Employment (September 2009).[3] "Numerous investigations have documented shocking rates of noncompliance with the minimum standards established in the FLSA, particularly in low-wage industries such as the janitorial, food service, garment, and hospitality industries." Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of A Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 Minn. L. Rev. 1317, 1318 (2008). For example, the *Broken Laws* study surveyed "4,387 low-wage workers in Chicago, New York City, and Los Angeles, [and] found that nearly two-thirds of low-wage workers had not been paid their complete wages the previous week, and that on average these workers were losing $2,634 annually to wage theft." Sebastian Amar & Guy Johnson, *Here Comes the Neighborhood: Attorneys, Organizers, and Immigrants Advancing A Collaborative Vision of Justice*, 13 N.Y. City L. Rev. 173 n.4 (2009).

An important reason why FLSA violations persist is because of the economic advantages gained by those who violate the Act. In passing the FLSA, Congress declared that violating the FLSA constitutes "an unfair method of competition in commerce." 29 U.S.C. § 202(a). As the Court has long recognized, failing to comply with the FLSA "would undoubtedly give petitioners and similar organizations an advantage over their competitors. It is exactly this kind of 'unfair method of

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[3] *Available at* http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1 (last visited Oct. 25, 2012).

competition' that the [FLSA] was intended to prevent.'" *Tony & Susan Alamo Found.*, 471 U.S. at 299. Aside from the inherently negative effects of substandard labor conditions on workers, violations of the FLSA are themselves "injurious to the commerce." *U.S. v. Darby*, 312 U.S. 100, 115 (1941). Given the continued and widespread nature of FLSA violations, effective FLSA enforcement is as important today as it was when Congress enacted the FLSA 74 years ago.

The FLSA is "remedial and humanitarian in purpose" because it protects "the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others." *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944). Rampant wage theft like that documented in the above-mentioned studies precludes the FLSA from "insuring to all our able-bodied working men and women a fair day's pay for a fair day's work." *A.H. Phillips v. Walling*, 324 U.S. 490, 493 (1945) (quoting Message of the President to Congress, May 24, 1934).

III. The FLSA's Collective Action Process Is Vital To Eliminating Substandard Working Conditions

Collective actions under Section 216(b) provide underrepresented workers a crucial mechanism for recovering their unpaid minimum and overtime wages. Plaintiffs are able to lower their individual costs, and judicial economy is served by resolving common issues arising out of the same allegedly unlawful conduct, in a single proceeding. *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989)

(discussing the FLSA's collective action procedure as incorporated by the Age Discrimination in Employment Act).

These benefits, however, "depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." *Sperling*, 493 U.S. at 170. The receipt of a court-approved notice is often the first time a worker learns of his/her FLSA rights. Because of the FLSA's opt-in requirement, it is only after workers learn of their rights that they can stop the running of the statute of limitations. 29 U.S.C. § 256.

In order to reach other workers who may be interested in opting in, an FLSA collective action plaintiff often must take discovery from the employer. *Sperling*, 493 U.S. at 170. And a court-approved notice "does not issue unless a court conditionally certifies the case as a collective action." *McKnight v. D. Houston, Inc.*, 756 F. Supp. 2d 794, 800 (S.D. Tex. 2010). Therefore, the FLSA plaintiff must be permitted a reasonable amount of time in which to pursue a collective action without the fear of being picked off by a unilateral "offer" from the company.

IV. If An Employer Can "Pick Off" The Lead Plaintiff In An FLSA Collective Action, Vulnerable Employees Are Even Less Likely To Assert Their Rights

For all workers, "the right to *file* a lawsuit in the future is materially different than . . . the right to *join* a lawsuit that is already pending." *Woods v. RHA/Tennessee Group Homes, Inc.*, 803 F. Supp. 2d

789, 801 (M.D. Tenn. 2011). "In the former situation, an employee who wishes to pursue a claim must undertake the potentially time-consuming and expensive process of finding and hiring an attorney; in the latter, all an employee must do is sign and return a Notice of Consent form." *Id.*

But "[e]specially for the poor, it is difficult to find lawyers of the private bar who are able and willing to take on what seems like an insignificant minimum wage violation." Susan Miloser, *Picking Pockets for Profit: Wage Theft and the Fair Labor Standards Act*, WASH. & LEE SCH. L. CAPSTONE PAPER at 34 (Spring 2011). After all, an employee who is not paid for an hour's worth of minimum wage work, each week, for 6 months, has a claim of less than $380. "To a private attorney, who bills that much or more per hour, the remedy seems hardly worth his time." *Id.*

The policy of providing representation in such circumstances is "at the very core" of the collective action device. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)) (discussing class actions under Federal Rule of Civil Procedure 23). As with class actions under Rule 23, Section 216(b) "solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Id.* Representative actions are most important for the "vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." *Amchem*, 521 U.S. at 617 (internal quotations and citations omitted).

Most working Americans fit this bill. The FLSA's structure and enforcement mechanism is premised

on the common-sense recognition that there is "unequal bargaining power as between employer and employee[.]" *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706 (1945). Thus, a principal purpose of the FLSA is "to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." *Id.* at 707. Such workers are, by definition, unlikely to oppose an employer's violation of the wage and hour laws. *Cf. Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions").

Individual litigation also exposes a worker to retaliation—a particularly pointed concern for unorganized workers. Few things focus an employer's attention on an employee more sharply than the filing of a lawsuit. The risk of retaliation faced by a worker who opposes unlawful conditions "is no imaginary horrible given the documented indications that fear of retaliation is the leading reason why people stay silent instead of voicing their concerns[.]" *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 555 U.S. 271, 279 (2009) (internal punctuations and citations omitted). These employees live "paycheck-to-paycheck" and can ill afford the interruption or reduction in pay that often accompanies retaliation.

Thus, the fact even a single worker is prepared to serve as a lead plaintiff is often miraculous. David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L. & Pol'y J. 59, 83

(2005) ("Studies suggest that, despite explicit retaliation protections under various labor laws, being fired is widely perceived to be a consequence of exercising certain workplace rights."). Collective actions provide these workers with at least some measure of protection from "individualized retaliation." *Bonilla v. Las Vegas Cigar Co.*, 61 F. Supp. 2d 1129, 1139 (D. Nev. 1999); *see also* Alba Conte & Herbert Newberg, *Newberg on Class Actions*, § 24.61 (4th Ed. 2002).

Collective actions also encourage compliance with the FLSA by raising the stakes for employers who break the law. An employer who violates the FLSA knows it may have to answer to more than a single, brave lead plaintiff. Collective actions therefore serve the "prophylactic function" encouraging employers to comply with the FLSA. *Amalgamated Workers Union of Virgin Islands v. Hess Oil Virgin Islands Corp.*, 478 F.2d 540, 543 (3d Cir. 1973). If an employer can "opt-out" of a collective action prior to the issuance of notice, "the enforcement of [FLSA] remedies for violations which victimize a group of people will be limited only to those victims who are already known to their 'champion,' . . . or who are fortunate enough to hear and heed 'the vagaries of rumor and gossip,' . . . or who are courageous enough to recognize the wrong done them and sue on their own." *Sperling v. Hoffmann-La Roche, Inc.*, 118 F.R.D. 392, 403 (D.N.J. 1988) *aff'd in part, appeal dismissed in part sub nom. Sperling v. Hoffman-La Roche Inc.*, 862 F.2d 439 (3d Cir. 1988) *aff'd and remanded sub nom. Hoffmann-La Roche Inc. v. Sperl*ing, 493 U.S. 165 (1989). This simply does not comport with the broad remedial goals of the FLSA.

V. Permitting "Pick Offs" Encourages Repetitive Litigation

The collective action process is supposed "to avoid multiple lawsuits where numerous employees have allegedly been harmed by a claimed violation or violations of the FLSA by a particular employer." *Prickett v. DeKalb County*, 349 F.3d 1294, 1297 (11th Cir. 2003). Moreover, Rule 68 is designed to reduce, not increase, the need for litigation. *See Marek v. Chesny*, 473 U.S. 1, 5 (1985) ("The plain purpose of Rule 68 is to encourage settlement and avoid litigation."); *cf. Zinni v. ER Solutions, Inc.*, 692 F.3d 1162, 1168 (11th Cir. 2012) (finding that an offer that does not include an offer of judgment is insufficient to moot an action, because a judgment is necessary to prevent the need for a second lawsuit if the defendant fails to pay). But, in many instances, the rule proposed by Petitioners would serve neither of these goals.

Petitioners instead demand an approach which foments more lawsuits. Rather than resolving the claims of the similarly situated workers in a single action, Petitioner wants to pay a single worker in a transparent effort to keep the wages it owes to the rest. Picking off named plaintiffs through unaccepted Rule 68 offers impedes judicial economy and forces multiple individual lawsuits stemming from the same allegations (or worse, encourages workers to simply give up trying to recover the wages they are owed). Courts should discourage defendants' attempts to buy off individual claims of named plaintiffs that "encourage a 'race to pay off' named plaintiffs very early in litigation.'" *Liles v. Am. Corrective Counseling Services, Inc.*, 201 F.R.D.

452, 455 (S.D. Iowa 2001). Rejecting this tactic "restore[s] Rule 68 to the role it should have—a means of facilitating and encouraging settlements, rather than a clever disguise for gaining an advantage by racing to the courthouse." *Asch v. Teller, Levit & Silvertrust, P.C.*, 200 F.R.D. 399, 401 (N.D. Ill. 2000).

VI. Government Enforcement Is Not Enough

The Chamber of Commerce suggests the Court need not worry about robbing employees of their private attorneys general because "government enforcement" will "ensure that truly meritorious FLSA cases are pursued in the best interests of employees[.]" *See* Brief for the Chamber of Commerce as *Amicus Curiae*, p. 15. The Department of Labor does, indeed, do much good on behalf of America's workers. But there can be no real dispute that the overwhelming majority of FLSA enforcement comes from private litigation.

The Department of Labor estimated that 70% of employers were not in full compliance with the FLSA and management-side lawyers called this as a "gross understatement" of the actual rate of non-compliance. *See* Steve Bruce, *70% Not in FLSA Compliance? 'A Gross Understatement,'* HR Daily Advisor (March 24, 2010).[4] Another study, however, estimates that the annual probability of a Department of Labor inspection of one of the seven million workplaces covered by the FLSA is well

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[4] *Available at* http://hrdailyadvisor.blr.com/archive/2010/03/24/FLSA_Wages_Compliance_Class_Action.aspx (last visited Oct. 25, 2012).

below 0.1%. *See Why Complain?* 27 Comp. Lab. L. & Pol'y J. at 62. Therefore, while the Department of Labor often does good work on the cases it investigates, the low chance of an investigation is easily discounted by employers.

The wages lost to FLSA violations are staggering. The Employer Policy Foundation, a business-funded think tank, has estimated that nationwide, employers unlawfully fail to pay $19 billion annually in wages owed to employees. Craig Becker, *A Good Job for Everyone: Fair Labor Standards Act Must Protect Employees in Nation's Growing Service Economy*, Legal Times, Vol. 27, No. 36 (Sept. 6, 2004). But, as noted by the Chamber of Commerce, the Department of Labor's efforts resulted in the recovery of a tiny fraction (approximately 1%) of these unpaid wages.

While the Department of Labor's efforts are laudable, it lacks the resources necessary to protect all workers currently covered by the FLSA. In 1941, when the FLSA covered 15.5 million American workers, the Department of Labor's Wage and Hour Division employed 1,769 investigators and launched 48,449 investigations. Kim Bobo, *Wage Theft in America: Why Millions of Working Americans Are Not Getting Paid – And What We Can Do About It* 121 (The New Press 2009). By contrast, in 2007, when 130 million American workers were protected by the FLSA, the Division employed *fewer* investigators—only 750—and conducted only 24,950 investigations.

Given this resource deficit, it is unsurprising that most FLSA enforcement falls to private plaintiffs. James C. Duff, Administrative Office of the U.S. Courts, *Judicial Business of the United States*

Courts, 2010 Annual Report of the Director at 146, tbl. C-2 (2010) (noting that in 2007 the Department of Labor filed approximately 2% of the FLSA cases in federal court).[5] Given the number of FLSA cases filed each year, "government enforcement" represents only a tiny fraction of the total enforcement required to recover workers' unpaid wages and encourage employers to comply with the FLSA. And without effective enforcement, rules like the FLSA "are but words on paper."[6]

Congress envisioned the collective action provision as a way of "minimizing the cost of enforcement by the Government" by giving employee's direct rights to enforce FLSA compliance, thus avoiding the assumption by Government of the sole responsibility to enforce the act." 83 Cong.Rec. 9264 (1938) (statement of Rep. Keller). At the very least, FLSA collective actions serve as an essential "supplement" to the Department of Labor's enforcement efforts. *Ervin v. OS Rest. Services, Inc.*, 632 F.3d 971, 978 (7th Cir. 2011).

CONCLUSION

FLSA collective actions are vital to the effective enforcement and implementation of the FLSA's broad remedial goals. Permitting defendants to "pick off" lead plaintiffs and effectively preclude collective actions allows those engaging in wage theft to avoid the full measure of the consequences of their actions.

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[5] *Available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2020/JudicialBusinespdfversion.pdf (last visited Oct. 25, 2012).

[6] *Cf.* Elinor Ostrom, *Rules Without Enforcement are But Words on Paper*, IHDP Newsletter 2:8-10 (2004).

The right to "maintain" a collective action for "others similarly situated" is congressionally mandated, prevents wasteful serial litigation, and allows the most vulnerable sectors of the American workforce to enjoy the benefits of acting collectively. For these reasons and those set forth herein, *Amici* believe that the decision of the Third Circuit Court of Appeals should be affirmed in its entirety.

Respectfully Submitted,

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GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORP.,
Petitioners,
v.
LAURA SYMCZYK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION, NATIONAL WOMEN'S LAW CENTER, CHANGE TO WIN, NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, NATIONAL CONSUMER LEAGUE AND NATIONAL CONSUMER VOICE FOR LONG TERM CARE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI

Amici curiae submit this brief, with the consent of the parties,[1] on behalf of the Service Employees International Union, the National Women's Law Center, Change to Win, the National Consumer Voice for Quality Long Term Care, the National Consumers League, and the National Partnership for Women & Families. *Amici* are labor organizations (including the largest healthcare union in the United States, representing approximately 160,000 nursing home workers of which almost 5,000 are employees of petitioner Genesis Healthcare), women's advocacy organizations, and consumer groups that advocate for the rights of nursing home residents and their families. Together *amici curiae* have a strong interest in meaningful enforcement of labor and employment laws and a particular interest in the enforcement of these laws in the nursing home industry.

Nursing home workers are a poorly paid, overwhelmingly female workforce whose wage and hour rights are routinely violated. These violations harm not only workers, but also the nursing home residents for whom they care, because when nursing homes reduce staffing levels by evading overtime protections, they heighten the danger of accidents and mistakes caused by worker fatigue that imperil residents. Ensuring that nursing home workers can assert their wage and hour rights in court thus benefits both workers and the nursing home residents for whom they care.

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[1] Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

More detailed descriptions of each of the *amici* appear in the Appendix.

INTRODUCTION AND SUMMARY

Laura Symczyk worked as a registered nurse at a nursing home owned and operated by Genesis Healthcare Corporation in Philadelphia, Pennsylvania. Complaint at ¶ 12, *Symczyk v. Genesis Healthcare Corp.*, No. 09-cv-05782, 2010 WL 2038676 (E.D. Pa. May 19, 2010), *rev'd*, 656 F.3d 189 (3d Cir. 2011), *cert. granted*, 80 U.S.L.W. 3512 (U.S. June 25, 2012) (No. 11-1059). She filed this case under the Fair Labor Standards Act ("FLSA"), on behalf of herself and all other similarly situated employees, alleging that her employer Genesis Healthcare Corporation violated the FLSA through its policy of deducting thirty minutes for meal breaks from employees' pay regardless of whether employees performed compensable work during meal breaks. *Id.* at ¶ 1. Ms. Symczyk identified those similarly situated as "all non-exempt employees" subject to this policy, including secretaries, housekeepers, custodians, clerks, porters, registered nurses, respiratory therapists, administrative assistants, nurses' aides, quality coordinators, operating room coordinators, medical coders, medical underwriters and others. *Id.* at ¶ 14. Genesis Healthcare Corporation owns over 200 nursing homes, with over 25,000 beds in thirteen states, and employs over 50,000 workers. *See* Meg LaPorte, *2012 Top 50 Largest Nursing Facility Companies*, Provider Magazine (Jun. 1, 2012), http://www.providermagazine.com/reports/Documents/2012/0612_Top50.pdf; Genesis HealthCare, http://www.genesishcc.com/about-us (last visited Oct. 24, 2012).

Nursing home workers like those on behalf of whom Ms. Symczyk brought suit are predominantly women earning near poverty-level wages. Wage and hour violations are the norm in the nursing home industry. *See* DOL, *Annual Report Fiscal Year 2004, Performance and Accountability Report, Strategic Goal 2: A Secure Workplace* [hereinafter *Annual 2004 Report*]. This industry is also characterized by high turnover and poor working conditions. *See* Jennifer R. Salmon et al., Florida Dept. of Elder Affairs, *Nurse Aide Turnover: Literature Review of Research, Policy and Practice* 1 (1999); Jeanne Geiger-Brown et al., *Demanding Work Schedules and Mental Health in Nursing Assistants Working in Nursing Homes*, 18 Work & Stress 292, 293-294 (2004). Moreover, these abuses of the nursing home industry workforce have been shown to correlate directly with poor patient care. *See, e.g.*, Amy Witkoski & Victoria Vaughan Dickson, *Hospital Staff Nurses' Work Hours, Meal Periods, and Rest Breaks*, 58 Am. Ass'n Occupational Health Nurses J. 489, 490 (2010) (fatigue from overwork correlated with diminished patient care). The extensive and well-documented wage and hour violations in the nursing home industry are typical of many industries employing high concentrations of low-wage workers, including garment factories, restaurants, construction, agriculture and poultry processing. Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers*, 63 Vand. L. Rev. 727, 737 (2010) [hereinafter "*Facilitating*"]; Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 Am. U. L. Rev. 523, 560-61 (2012) (collecting

studies). A recent three-city study found 26% of low-wage workers surveyed were paid below minimum wage and 75% did not receive overtime pay they were due in the prior week. *See* Moss & Ruan, *supra*, at 561. The problem of wage theft is particularly acute for women workers, who make up about two-thirds of those earning minimum wages or less. NWLC calculations based on Bureau of Labor Statistics (BLS), *Characteristics of Minimum Wage Workers*, 2011, http://www.bls.gov/cps/minwage2011tbls.htm [hereinafter *BLS Min. Wage Characteristics*] (Table 1).

The FLSA was designed to protect these and other vulnerable workers from wage theft by their employers and give workers a mechanism to seek redress when it occurs. Nursing home workers and other low-wage workers need the FLSA to hold employers accountable. But collective actions are often the only means by which low-wage workers can prosecute violations of the FLSA. Low-wage workers are relatively unlikely to know the protections to which they are entitled and the process by which to enforce their rights; do not have the means to pay the upfront costs of hiring an attorney individually; and have real reason to fear for their jobs if acting alone in challenging their employers. By banding together through collective action, low-wage workers can efficiently achieve remedies for many harmed by an unlawful policy or practice through a single legal vehicle, enhance their ability to obtain legal representation, lower the financial and investigative burden for those in the class, and lessen the likelihood of retaliation against any individual employee.

Collective actions are critical not only to enforcement of the FLSA's wage and hour rules, but also to

protecting women from wide-scale pay discrimination under the Equal Pay Act, which is an amendment to the FLSA and which utilizes the same collective action mechanism. Through collective actions, low-wage women workers challenging pay discrimination can overcome these same barriers to individual litigation.

Genesis is asking this Court to rule that a Rule 68 offer of judgment to a named plaintiff prior to other plaintiffs opting into a collective action moots the case, even when the offer was made prior to notice of the action being sent to other potential plaintiffs and thus prior to other potential plaintiffs having a meaningful opportunity to join the suit.[2] Such a ruling would profoundly undermine the availability of collective actions and, in so doing, thwart the primary goal of the FLSA: protecting the most vulnerable workers from wage theft.

In this case, the district court granted Genesis' motion to dismiss for lack of subject matter jurisdiction, on the grounds that Genesis' rejected Rule 68 offer of judgment to Ms. Symczyk satisfied her individual claims and mooted the suit. *Symczyk*, 2010 WL 2038676, at *4. The Third Circuit correctly reversed on grounds that Genesis could not moot the collective action at this early stage by making a Rule 68 offer of judgment, reasoning that Ms. Symczyk should be provided an opportunity to

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[2] Similar to the class action mechanism under Rule 23, under the FLSA, plaintiffs can bring a collective action on behalf of themselves and all other similarly situated employees, 29 U.S.C. § 216(b), but unlike a Rule 23 class action, in a collective action, putative members of the collective must "opt in" to participate in the suit. *See Hoffman-LaRoche v. Sperling*, 493 U.S. 165 (1989) (interpreting 216(b) in the context of the Age Discrimination and Employment Act); 7B Charles Alan Wright et al., *Federal Practice and Procedure* § 1807 (3d ed. 2012).

make a timely motion for class certification. 656 F.3d at 189. If and when she did so, the Third Circuit held, under the "relation-back" doctrine, the motion would be treated as if it had been made at the time the complaint was filed, thus saving the suit from mootness. *Id.* at 201.

The tactics Genesis employed—offering to settle with the plaintiff prior to notice being given to other plaintiffs, and then moving to dismiss the suit—are not unusual. In cases arising under the FLSA, defendants often seek to "pick[]-off" the named plaintiff prior to notice of the suit being sent to class members in attempts to stymie low-wage workers' ability to challenge company-wide wage theft. *Cf. Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) (describing defendants' attempts to "pick[] off" named plaintiffs in Rule 23 class action); Ruan, *Facilitating*, *supra*, at 736-740. A ruling by this Court that allows employers to moot a collective action by picking off the plaintiff early in the case would profoundly impair workers' ability to prosecute FLSA and EPA violations. Such a ruling would severely diminish the effectiveness of these statutes and run counter to Congress' purposes and intent. This Court should make clear that the law does not permit defendants to short circuit workers' ability to enforce their statutory rights in this manner.

ARGUMENT

I. PROTECTING LOW-WAGE WORKERS AND PROVIDING A FAIR MEANS FOR THEM TO VINDICATE THEIR RIGHTS ARE CORE PURPOSES OF THE FAIR LABOR STANDARDS ACT.

Enacted in 1938 at the height of the Great

Depression, the Fair Labor Standards Act was described by President Roosevelt as protecting "the fundamental interests of free labor and free people" by ensuring "only goods which have been produced under conditions which meet the minimum standards of free labor . . . be admitted to interstate commerce." H.Rep.No. 1452, 75th Cong., 1st Sess. (August 6, 1937) (statement of President Roosevelt). Prior to the FLSA, there was no minimum wage or premium pay for overtime work mandated by federal law, and employees were "at the mercy of their employer, with little leverage to improve their working conditions, while employers had few limitations on treatment of employees." *Examining Regulatory and Enforcement Actions Under the Fair Labor Standards Act: Hearing Before the Subcommittee on Workforce Protections, Committee on Education and the Workforce*, 112th Cong. 4 (2011) (statement of Rep. Lynn Woosley). The FLSA was "groundbreaking" and "helped millions of Americans improve their standard of living while providing for the appropriate level of balance between workers' rights and the rights of the employer." *Id.* at 4-5. It established a wage floor that would be "adequate to support life and a measure of human dignity." 134 Cong. Rec. S12688-02 (daily ed. Sept. 16, 1988). It also banned "oppressive working hours." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981). The Act sent a powerful message that the United States would not condone "widespread unemployment or substandard living conditions for millions of [its] workers." *Fair Labor Standards Act Amendments of 1949, Subcomm. of the Comm.*

on Labor and Public Welfare, 81 Congr. 17 (April 11, 12, 13, 14, 18, 19, 20, 21, and 22, 1949) (statement of the Hon. Maurice J. Tobin, Secretary of Labor).

The Supreme Court has consistently recognized the FLSA's motivating purpose of providing critical protections to vulnerable workers and interpreted the FLSA consistent with this purpose. Echoing President Roosevelt, the Court described the Act as intended "to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 n.18 (1945) (citing 81 Cong. Rec. 7652, 7672, 7885; 82 Cong. Rec. 1386, 1395, 1491, 1505, 1507; 83 Cong. Rec. 7283, 7298, 9260, 9265; H. Rep. No. 75-1452, at 9 (1937); S. Rep. No. 75-884, at 3, 4 (1937)); *see also D.A. Schulte, Inc., v. Gangi*, 328 U.S. 108, 116 (1946) (touchstone of the Act was "to secure for the lowest paid segment of the nation's workers a subsistence wage"). The Court also heralded the law as "remedial and humanitarian in purpose" because it dealt not with "mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others." *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944). Commensurate with this understanding, the Court has "consistently construed the Act . . . to the furthest reaches consistent with congressional direction.'" *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207 (1959).

II. NURSING HOME WORKERS EPITOMIZE THE VULNERABLE WORKERS THE FAIR LABOR STANDARDS ACT WAS DESIGNED TO PROTECT.

A. Nursing Home Workers Earn Low Wages and Have Little Bargaining Power.

Nursing home workers, on behalf of whom this case was filed, are precisely the kind of workers who are especially vulnerable to exploitation and whom the FLSA was designed to protect. Recognizing this, Congress amended the FLSA in 1961 specifically to expand coverage to hospitals and nursing homes. During the hearing on the amendment, the American Nurses' Association ("ANA") testified that by "any measure," these employees were "ill paid," effectively converted into "involuntary philanthropists" by their substandard wages, and badly in need of the FLSA's protections. *Minimum Wage-Hour Legislation: Hearing Before the General Subcommittee on Labor of the H. Comm. on Education and Labor*, 88th Cong. 620-625 (1964) (statement of Dolores LeHoty, Director of the Economic Security Program of the American Nurses Association). Today, the nursing home workforce continues to be impoverished and in need of protection. Low wages and persistent occupational gender segregation remain signature characteristics of the nursing care facilities industry. Indeed, eight of the ten most common occupations in nursing care facilities pay median hourly wages between $9.23 and $11.42. Bureau of Labor Statistics (BLS), Occupational Employment Statistics (OES), *May 2011 National Industry-Specific Occupational Employment and Wage Estimates: NAICS 623100 Nursing Care*

Facilities, http://www. bls.gov/oes/current/naics4_623100.htm (last modified Mar. 27, 2012) [hereinafter *Nursing Care Facilities*]. In comparison, a full-time, year-round worker supporting a family of four would have to earn at least $11.40 per hour to bring her family above the poverty threshold. National Women's Law Center calculations from U.S. Census Bureau, Current Population Survey (CPS), 2012 Annual Social and Economic Supplement, Table 35, http://www. census.gov/hhes/www/cpstables/032012/pov/toc.htm. Among the ten most common occupations in nursing care facilities, only two—licensed practical and vocational nurses and registered nurses—earn higher median wages, at $20.40 and $28.24 per hour, respectively. BLS, *Nursing Care Facilities*, *supra*.

The largest segment of nursing home workers are nursing aides, orderlies, and attendants. Audrey Watson, BLS, *Occupational Composition of the Elder Care Industries* 53, 63 (2005), http://www.bls.gov/oes/2005/may/elder.pdf. These workers make up 38% of the nursing care workforce and earn a median wage of $11.30 per hour. BLS, *Nursing Care Facilities*, *supra*. The overwhelming majority of these workers are women, and most have little education. For example, 92% of certified nursing assistants are women and 75% have a high school diploma or less. Centers for Disease Control and Prevention, *National Nursing Assistant Survey 2004-2005*, Table 24. Data also show that women make up the vast majority of workers in those occupational categories that are most common in nursing homes. For example, some of the other common occupations in nursing homes include maids and housekeeping cleaners, nonrestaurant food servers, and laundry and dry-cleaning workers. All of these

occupations are heavily female: 89% of maids and housekeeping cleaners are women; 68% of nonrestaurant food servers are women; and 61% of laundry and dry-cleaning workers are women. BLS, *Labor Force Statistics from the Current Population Survey: CPS, 2011 Annual Averages*, Table 11, http://www.bls.gov/cps/tables.htm#annual (last modified Jul. 6, 2012). In addition, all of these occupations pay very low wages—between $399 and $419 in median weekly earnings for full-time workers. *Id.* at Table 39.

The nursing home industry is not an anomaly among female-dominated industries; low wages are common for women workers, and especially common for women in female-dominated occupations and industries. Although women make up less than half of the overall American workforce, they account for about two-thirds of those making minimum wage or less. Rebecca Thiess, *The Future of Work, Trends and Challenges for Low-Wage Workers*, Economic Policy Institute 4 (2012); BLS, *Min. Wage Characteristics*, *supra*, at Table 1. In general, there is a negative relationship between the proportion of women in a particular job category and the average earnings for workers in that job. *See* Ariane Hegewisch et al., *Separate and Not Equal? Gender Segregation in the Labor Market and the Gender Wage Gap* (2010), *available at* http://www.iwpr.org/publications/pubs/separate-and-not-equal-gender-segregation-in-the-labor-market-and-the-gender-wage-gap. For example, among all "low-skilled" workers, women in female-dominated occupations earn 73.8% of the median weekly earnings of men in male-dominated occupations. *Id.* at 11.

When nursing home workers and other low-wage

women workers are victims of wage theft, their low wages often make it prohibitively difficult for them to seek redress. Obtaining legal representation to prosecute an individual claim is simply unaffordable for most low-wage workers. Further, because of their low wages, the risk of retaliation in the form of job loss poses a much greater threat to these workers than to higher-wage workers who are more likely to have a cushion to fall back on in the event they are fired. Finally, less educated workers are less likely to bring suit to enforce their workplace rights, perhaps because they "may have [less] information about where and how to file a charge" or "may not feel as adept at exercising their rights as the highly educated group." Michele M. Hoyman & Lamont E. Stallworth, *Who Files Suits and Why: An Empirical Portrait of the Litigious Worker*, 128 U. Ill. L. Rev. 127, 128 (1981).

B. High Turnover Rates in the Nursing Home Industry Make It Even More Difficult for Nursing Home Workers to Enforce Their Workplace Rights.

For nursing home workers, the difficulty in asserting and enforcing their rights is compounded by the extraordinarily high turnover rate in the nursing home industry. Historically, "nursing homes have [had] higher turnover rates for all staff categories" than any other industry in the service sector. Salmon et al., *supra*, at 1. A review of 87 studies of nursing home staffing levels conducted between 1975 and 2003 found average annual turnover rates ranging from 40% to 190%. Jane E. Bostick et al., *Systematic Review of Studies of Staffing and Quality in Nursing Homes*, 7 J. Am. Med. Directors Ass'n, 366, 372 (2006). The American

Health Care Association (AHCA) reported that in 2010, "the turnover rate for all nursing facility employees was 35.1 percent." American Health Care Association, *Report of Findings: Nursing Facility Staffing Survey 2010*, 3 (2011). The turnover rate was especially high among nursing care staff. *Id.*

The high turnover rates in nursing homes are partly a function of low wages and benefits and partly a function of extremely high rates of injury. *See Nursing Staff in Hospitals and Nursing Homes: Is It Adequate?* 161, 174 (Gooloo S. Wunderlich et al. eds., 1996). OSHA reported that "[i]n 2010, nursing homes and personal care facilities had one of the highest rates of injury and illness among industries for which lost workday injury and illness (LWDII) rates are calculated." Occupational Safety and Health Administration, *Nursing Homes and Personal Care Facilities*, *available at* http://www.osha.gov/SLTC/nursinghome/index. html (last visited Oct. 24, 2012); *see also* Douglas Myers et al., *Predictors of Shoulder and Back Injuries in Nursing Home Workers: A Prospective Study*, 41 Am. J. Indus. Med. 466, 466 (2002) ("Nursing home workers, particularly [nursing assistants], have among the highest rates of back and shoulder injuries in the US as well as in other countries"). High injury rates contribute to an insidious cycle in which injuries lead to turnover, a thinner staff is then overworked, resulting in more turnover, which leads to more injuries. *See* Geiger-Brown et al., *supra*, at 293-294.

The result is a workforce that frequently shifts from employer to employer. Because nursing home workers often have a short tenure at their jobs and because their wages are low, their potential FLSA claims are

likely to be small in absolute terms, even if the losses are significant to the worker, making it extremely difficult for workers to pursue individual claims. Moreover, because these workers do not stay at one job long, they may be less likely to conclude that the cost and effort of seeking to enforce their workplace rights will pay off in the long run.

C. Rampant Wage Theft Is Common in the Nursing Home Industry.

Perhaps because nursing home workers tend to be particularly vulnerable in these ways, the Department of Labor reports that an astounding 45% of nursing homes were noncompliant with FLSA requirements in 2004, and 60% were noncompliant in 2000. *See* DOL, *Annual 2004 Report*, *supra*; *see also* DOL, Wage and Hour Division, *Nursing Home 2000 Compliance Survey Fact Sheet* [hereinafter *2000 Survey*]. The Department of Labor's 2000 survey of 136 nursing homes found that "over $432,000 in minimum wage and overtime back wages were . . . due 1,576 employees." DOL, *2000 Survey*, *supra*.

Noncompliance with the FLSA in the nursing home industry often takes the form of denying workers earned overtime. High turnover and injury rates, as well as employer efforts to boost profits, have led to chronic understaffing. A 2001 study commissioned for Congress found that 97% of nursing homes maintained sub-optimal staffing levels. *See* Marvin Feuerberg, Centers for Medicare and Medicaid Services, *Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes Report to Congress: Phase II Final* 5 (2001). Based on an analysis of data collected by government agencies between 2000 and 2006, *The New*

York Times reported that "at 60 percent of homes bought by large private equity groups from 2000 to 2006, managers have cut the number of clinical registered nurses, sometimes far below levels required by law." Charles Duhigg, *At Many Homes, More Profit and Less Nursing*, New York Times, 3 (Sept. 23, 2007). Professor Charlene Harrington, who has studied the nursing home industry extensively, observed "[t]he first thing owners do is lay off nurses and other staff that are essential to keeping patients safe . . . . [C]hains have made a lot of money by cutting nurses, but it's at the cost of human lives." *Id.* Harrington's research showed that "nurse staffing was lower at investor-owned nursing homes for each occupational category." Charlene Harrington et al., *Does Investor Ownership of Nursing Homes Compromise the Quality of Care?*, 91 Am. J. Pub. Health 1452, 1453 (2001).

The combination of understaffing and high turnover forces existing staff to work overtime. *See* Kerry Hannon, *Eric Carlson: On Elder Care – and Elder Law*, USNEWS.com (Mar. 11, 2009). Understaffing has "forced workers into working longer shifts and work weeks, with fewer and shorter breaks, more weekends, and more rotating shifts to provide adequate coverage." Geiger-Brown, *supra*, at 293. But employers have largely failed to pay their workers for their additional time. A DOL survey of nursing homes conducted in 2000 revealed that "eighty-four percent (84%) of [nursing home] employers found in violation of the FLSA violated the overtime regulations." DOL, *2000 Survey*, *supra*. Among the four most common types of FLSA violations the DOL found in nursing homes was "Employee Paid Straight Time for Overtime Hours Worked." *Id.* The DOL surveys leave no doubt

that wage theft in the form of unpaid overtime is rampant in the nursing home industry and that the industry is in dire need of heightened enforcement.

Nursing home employers like Genesis also frequently violate the FLSA by failing to compensate their employees for all hours worked—the violation alleged in this case. Two of the four most common FLSA violations the DOL found in its 2000 survey were: "Improper Calculation of Regular Rate of Pay" and "Failure to Compensate for All Hours Worked." *Id.* The DOL's 2009 Fact Sheet on nursing care facilities states:

> The most common violation in the nursing care industry is the failure of employers to pay for all the [h]ours worked. This uncompensated time most frequently occurs when employers fail to pay for work performed: Before and after a worker's scheduled shift; during an employee's scheduled meal period; and while employees are attending staff meetings and compensable training sessions.

DOL, *Fact Sheet #31: Nursing Care Facilities under the Fair Labor Standards Act* (2009), http://www.dol.gov/whd/regs/compliance/whdfs31.pdf. The AARP likewise reports, "[o]ften, nursing homes fail to pay all the wages earned by their nursing assistants. Common problems reported by nursing assistants include not being paid for work before and after their shifts, during meals, or for training sessions . . . ." Mary Ann Wilner & Ann Wyatt, Paraprofessional Healthcare Institute, *Paraprofessionals on the Front Lines: Improving their Jobs, Improving the Quality of Long-Term Care*, 1, 13 (1998), http://www.directcareclearinghouse.org/download/Paraprofessionals_on_the_Front_Lines_ExecSum.pdf.

While nursing home workers face rampant wage and hour violations, they are by no means unique among workers in low-wage jobs. In a 2009 three-city study of more than 4,300 low-wage workers, for example, two-thirds of workers reported pay violations in a given week, suffering an average of $2,600 in lost wages per year, an amount equal to 15% of the average annual income to which they were entitled. Annette Bernhardt et al., *Broken Laws, Unprotected Workers*, 5 (2009), *available at* http://www.nelp.org/page/broken-laws/BrokenLawsReport2009.pdf?nocdn= [hereinafter *Broken Laws*]; *see also* Annette Bernhardt et al., *Working Without Laws: A Survey of Employment and Labor Law Violations in New York City* (2010), *available at* http://nelp.3cdn.net/ 990687e422dcf919d3_h6m6bf6ki.pdf. Absent meaningful enforcement mechanisms, in many instances the FLSA's protections are unavailable to nursing home workers and other low-wage workers.

D. Quality Patient Care in Nursing Homes Depends on Workers' Ability to Enforce Their Rights Under the FLSA

If the FLSA's enforcement mechanisms are rendered less effective, the wage and hour violations already common in the nursing home industry are likely to worsen. Lowering the risk of FLSA claims will allow overtime abuses to surge to even greater levels, as more nursing homes try to cut costs by requiring longer shifts with no overtime pay. Nursing homes will be even less likely to maintain adequate staffing levels. Because fatigued and overworked employees are more likely to make mistakes, this will ultimately result in a reduction in the quality of patient care.

Congress recognized the dangers faced by overworked employees in the language of the FLSA, stating that the Act was intended to address "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). Fatigue from working long hours significantly diminishes the quality of a worker's work. Fatigue "is strongly associated with cognitive, psychomotor, and behavioral impairment." Witkoski & Vaughan Dickson, *supra*, at 490. Any of these problems in the nursing home environment significantly impairs the quality of patient care.

After adjusting for hospital factors and patient-related risk factors, hospitals where employees worked an average of more than eight hours and forty-five minutes per day had nearly three times as many patient infections as those where the staff worked shorter shifts. Marianna Virtanen et al., *Work Hours, Work Stress, and Collaboration Among Ward Staff in Relation to Risk of Hospital-Associated Infection Among Patients*, 47 Med. Care 310, 315 (2009). Nurses are nearly twice as likely to make an error when working a shift of 8.5 to 12 hours as compared to a shift of up to 8.5 hours, and more than three times more likely to make an error when working a shift of 12.5 hours or more. Ann E. Rogers et al., *The Working Hours of Hospital Staff Nurses and Patient Safety*, Health Affairs, 202, 206 (2004). A review of more than 1.2 million workplace accidents found that accidents were significantly more likely to occur in the tenth working hour of the day and beyond, with accidents twice as likely to occur in the twelfth working hour than in any of the first nine hours. Kerstin Hänecke et al., *Accident Risk as a Function of Hour at Work and Time of Day*

as Determined from Accident Data and Exposure Models for the German Working Population, 24 Scandinavian J. Work, Env't & Health Supp. 3, 43, 45 (1998). Similarly, a review of more than 1,000 nursing homes in three states found that "[t]otal nursing hours per resident day were significantly associated with worker injury rates in nursing homes," and concluded that "[b]y improving staffing levels in nursing homes, both workers and residents will benefit." Alison M. Trinkoff et al., *Staffing and Worker Injury in Nursing Homes*, 95 Am. J. Pub. Health 1220, 1220, 1224 (2005).

When nursing homes reduce staffing levels by evading FLSA overtime protections, it harms both the workers and the residents. Permitting wage theft to go unchecked at even greater levels than it does today will compromise the well-being of workers and threaten the health of the nursing home residents who rely on nursing home staff for quality care.

III. COLLECTIVE ACTIONS ARE CENTRAL TO ACHIEVING THE PURPOSES OF THE FLSA

A. Congress Intended the Collective Action Mechanism to Be a Key Means for Achieving the FLSA's Purposes

Under Section 216(b) of the Fair Labor Standards Act, an employee may bring an action on behalf of "himself . . . and other employees similarly situated." 29 U.S.C. § 216(b). Employees who want to participate in the lawsuit must then file a written consent to become a party, *id.*, typically after the court has provided notice of the claims to potential class members, *see Hoffman-LaRoche*, 493 U.S. at 169-170. The collective

action mechanism has provided "an avenue of redress to a large group of underprivileged and underrepresented people and has been utilized widely in furthering the rights of minority and low-wage workers." Ruan, *Facilitating*, *supra*, at 730. Although Congress has modified the collective action mechanism over the years, *see generally* United States Statutes At Large, 80 Cong. Ch. 52, May 14, 1947, 61 Stat. 84 (now codified at 29 U.S.C. § 251), its intent to enable collective challenges under the FLSA has never wavered.

Because of the difficulty and expense of proceeding individually with small claims, and because companies committing wage and hour violations often commit them against groups of employees pursuant to company-wide policy, rather than only against an individual worker, effective private enforcement of the FLSA depends on the availability of collective actions. Eve H. Cervantes & L. Julius M. Turmun, *ABA Section of Labor and Employment Law, Introduction to Class Actions and Collective Actions*, 2-4, http://apps. americanbar.org/labor/lel-annualcle/08/materials/data/papers/119.pdf; *see also* Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates that Bar Class Actions Impact Low-Wage Workers*, Mich. St. L. Rev., 19 (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2159963&download=yes## [hereinafter *What's Left*] ("[W]hen alleging wage and hour violations, the same corporate policies, patterns, and practices usually affect multiple workers in a workplace, not just individuals."). In addition, the possibility of collective actions deters employers from committing wage theft in the first place, because of their potential magnitude and scope. Ruan, *What's Left*, *supra*, 19.

B. Collective Actions Alleviate the Costs, Burdens and Risks of Bringing Individual Claims that Prevent Most Low-Wage Workers from Challenging Wage Theft on Their Own.

Due to the costs and burdens of litigation, the size of individual recoveries and lack of information about their rights, low-wage working women like the nursing home workers in this case are unlikely to vindicate their rights under the FLSA unless they can do so in a collective action. In addition, individual litigants may reasonably fear retaliation, which is less likely to occur when workers proceed as a group to vindicate their rights. The availability of collective actions allows individual workers to overcome these barriers.

1. Collective actions allow low-wage workers to find legal representation to prosecute their relatively low dollar claims.

The collective action vehicle allows aggregation of small claims and makes it far more likely that workers will find legal representation. Additionally, once a collective action has been filed, other affected workers are more likely to be willing to prosecute their claims if they do not have to shoulder the personal burdens and costs of litigating an individual case.

Even when the money lost due to wage theft is a substantial percentage of a low-wage worker's income, the dollar amount of her claims will typically be low in comparison to the overall costs of litigation. Ms. Symczyk, for example, was offered $7,500 to resolve her claims in their entirety. Low-wage workers have been estimated to lose an average of $2,634 annually as

the result of wage and hour violations, and thus their individual FLSA claims are likely not to be worth substantially more than this. Bernhardt et al., *Broken Laws*, *supra*, at 5. This is especially true in industries that have high rates of employee turnover, like the nursing home industry, as short job spells with one employer further lower individual FLSA claims.

The low dollar amount of FLSA claims can make it prohibitively difficult for individual workers to find legal representation, particularly against large employers that have vast legal resources at their disposal. *See Chase v. AIMCO Props., L.P.*, 374 F. Supp. 2d 196, 198 (D.D.C. 2005) (concluding that without collective actions, very few plaintiffs could bring suits because "individual wage and hour claims might be too small in dollar terms to support a litigation effort"); Moss & Ruan, *supra*, at 562 ("[M]odest damages make most wage claims prohibitively costly to prosecute individually: an individual case worth a few thousand dollars is not worth the attorney time necessary for the required discovery and motions; it hardly is even worth the thousands of dollars in out-of-pocket costs for witness transcripts alone."). Additionally, individual litigation requires one plaintiff to shoulder the demands of the lawsuit, "including spending many hours assisting in the investigation of the claims." *See* Ruan, *What's Left*, *supra*, at 15. This significant investment of time and money is not possible for many low-wage workers. *Id.*

Although the Department of Labor's Wage and Hour Division ("WHD") prosecutes wage and hour claims, because of its extremely limited resources it is unable to assist the vast majority of workers affected by wage theft. Todd A. Palo, *Minimum Wage, Justifiably*

Unenforced?, 35 Seton Hall Legis. J. 36, 46 (2010). Indeed, the likelihood that a covered employer will be subject to an investigation by the WHD is less than .001 percent. David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L. & Pol'y J. 59, 62 (2006). Private enforcement of the FLSA is thus necessary to achieving the statute's purposes.

Indeed, private attorneys play the primary role in enforcing the FLSA, which provides one-way fee-shifting to encourage them to vindicate the important societal interest in employees being fully compensated for their work. *See* 29 U.S.C. § 216(b); *see also* Ruan, *Facilitating*, *supra*, at 730. But without collective actions, plaintiffs' attorneys have "negligible incentives" to bring FLSA claims. Ruan, *Facilitating*, *supra*, at 738; *see also* Moss & Ruan, *supra*, at 562 ("A chance at statutory attorneys' fees provides insufficient incentive in individual cases, as the typically modest settlement amounts do not leave much for fees and courts routinely reduce even prevailing attorneys' fees."). Collective actions, on the other hand, "allow[] . . . plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources." *Hoffman-LaRoche*, 493 U.S. at 170; *see also Roper*, 445 U.S. at 338 (observing that class actions have played a great role "in vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost"). Collective actions permit low-wage workers to find legal representation.

2. Collective actions help ensure that low-wage workers will not be prevented from asserting their rights by a lack of information about employer practices or legal processes.

Low-wage workers are likely to be less educated than their higher-paid counterparts, and as a result less familiar with laws that protect them. They may be unaware that particular employer practices are a violation of federal law. In some instances, when employer pay calculations are opaque, they may even be unaware of an employer's policies and practices regarding pay. This problem is exacerbated by common workplace policies forbidding workers from discussing wages or salaries, which further obscure employer pay policies and practices. Indeed, in a recent survey, over 61 percent of private-sector workers reported that their employer either prohibited or discouraged discussion of wages. Ariane Hegewisch et al., Institute for Women's Policy Research, *Pay Secrecy and Wage Discrimination* (2011), http://www. iwpr.org/initiatives/pay-equity-and-discrimination/#publications.

Collective actions help ensure that workers' lack of information does not shield employers from liability. In collective actions only one worker needs to file a charge on behalf of others "similarly situated" in order to initiate this process for many other potentially affected workers. The process by which collective actions are certified, which typically includes notice to potential plaintiffs of the claims in the case, ensures that similarly situated workers receive the information about alleged employer violations of law that is necessary to enforcing their rights.

3. Collective actions help reduce the prospect of retaliation, which otherwise makes it extremely difficult for low-wage workers to enforce their rights.

Workers are often deterred from complaining about their employer's violations of law by a reasonable fear of retaliation by the employer. *See Crawford v. Metro. Gov't*, 555 U.S. 271, 279 (2009). This problem is especially serious for employees who wield little power in their workplace, such as low-wage female workers. *See* Deborah Brake, *The Function of Retaliation: Silencing Challengers and Preserving Existing Power Structures*, 90 Minn. L. Rev. 18, 36 (2005). The FLSA, like Title VII of the Civil Rights Act of 1964, contains an anti-retaliation provision, *see* 29 U.S.C. § 215(a)(3), but even in the face of explicit statutory protections, workers widely and accurately perceive that exercising their rights in the workplace carries a risk of being fired. David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L. & Pol'y. J. 50, 83 (2006). Indeed, a comprehensive study recently found 43% of low-wage workers who complained about violations of their workplace rights were retaliated against, by being fired, suspended or threatened with reductions in hours or pay. Nantiya Ruan, *What's Left*, *supra*, at 16. Low-wage workers are particularly vulnerable to the threat of retaliation, both because they are more likely to live paycheck-to-paycheck and thus less able to absorb the impact of a job loss or reduced hours, and because employers often view them as easily replaceable.

Proceeding through collective actions makes retaliation less likely, as plaintiffs benefit from the safety that comes in numbers. *See e.g., Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999) (presuming that class members still working for the employer might be unwilling to sue individually for fear of retaliation); *Simmons v. City of Kansas City*, 129 F.R.D. 178, 180 (D. Kan. 1989) (certifying class of police officers challenging discrimination in part to minimize the likelihood of retaliation against individual class members). It is far more difficult for an employer to target a large number of workers standing together to challenge an employer practice than it is for an employer to retaliate against a worker standing alone. This protection from retaliation is important for all workers, but is critically important for low-wage workers.

IV. COLLECTIVE ACTIONS ARE CENTRAL TO ACHIEVING THE PURPOSES OF THE EQUAL PAY ACT.

A. Providing a Means for Women Workers to Address Wide- Scale Pay Discrimination Is a Core Purpose of the Equal Pay Act.

The Equal Pay Act of 1963 ("EPA") prohibits sex-based differences in pay between men and women working in the same establishment and performing jobs requiring "equal skill, effort and responsibility [. . .] under similar working conditions." 29 U.S.C. § 206(d). Congress passed the EPA as an amendment to the FLSA, to obviate "the need for a new bureaucratic structure to enforce equal pay legislation," and to take advantage of the fact that "compliance should be made

easier because both industry and labor have a long-established familiarity with existing fair labor standards provisions." H.R. Rep. No. 309, 88th Cong, 1st Sess. 2 (1963) (cited in Albert H. Ross and Frank V. McDermott, Jr. *The Equal Pay Act of 1963: A Decade of Enforcement*, 16 B.C. L. Rev. 1 (1974), *available at* http://lawdigitalcommons.bc.edu/bclr/vol16/iss1/1. The EPA incorporates the same collective action mechanism available to plaintiffs in FLSA lawsuits. *See* Wright et al., *supra*, at § 1807 (noting that EPA suits rely on the collective action provision of the FLSA).

The purpose of the EPA was to root out systemic, company-wide, and indeed society-wide, pay practices that discriminated against women. Congress was concerned with "what was perceived to be a serious and endemic problem of employment discrimination in private industry—the fact that the wage structure of 'many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.'" S. Rep. No. 176, 88th Cong., 1st Sess., 1 (1963). To address this problem, the EPA is "broadly remedial" and "should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve." *Corning Glass Works v. Brennan*, 417 U.S. 188, 208 (1974).

The collective action mechanism in 216(b) was the key means through which women could challenge pervasive company-wide discriminatory compensation structures typical of the American workplace at the time of the EPA's passage in 1963, and which still persist today. Although today women make up nearly half the workforce, the typical woman working full-time,

year-round earns only 77 cents for every dollar earned by her male counterpart. Carmen DeNavas et al., United States Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2010*, 5 (2011), http://www.census.gov/prod/2011pubs/p60-239.pdf. Research has shown that even when factors such as years of work experience, education level, occupation, industry, union status and race are taken into account, 41% of the wage gap remains unexplained. *Pay Equity in the Workplace, Committee on Senate Health, Education, Labor and Pensions*, 3/11/10 Cong. Testimony (Pg. Unavail. Online), 2010 WLNR 5079748 (Statement of Heather Boushey, Senior Economist at the Center for American Progress Action Fund) (citing study by Blau and Kahn).

B. Collective Actions Enable Women Workers to Learn About and Address Wide-Scale Compensation Discrimination.

Just as in wage and hour cases, collective actions allow women challenging pay discrimination to find legal representation that otherwise would be unavailable given the small absolute stakes of many individual pay discrimination cases. Additionally, just as in wage and hour cases, the collective action shields workers from the risk of retaliation to which they would otherwise be exposed. As the Supreme Court recently recognized, the "[f]ear of retaliation is the leading reason" why many victims of pay and other discrimination "stay silent." *Crawford*, 555 U.S. at 279.

Notice to potential plaintiffs that a collective action has been brought on their behalf under the Equal Pay

Act can also serve the crucial purpose of alerting workers to pay discrimination that they otherwise may have insufficient information to recognize. Employees frequently have little to no information about their coworkers' wages and salaries. Employer pay scales are often confidential, and, as noted above, in many workplaces, explicit rules forbid disclosure of pay. *See* H.R. Rep. No. 110-237, at 7 (2007) (House Report on the Lilly Ledbetter Fair Pay Act of 2007); Leonard Bierman & Rafael Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law*, 25 Berkeley J. Emp. & Lab. L. 167, 168, 171 (2004). Although such rules are prohibited under the National Labor Relations Act,[4] an estimated one-third of private sector employers prohibit employees from discussing pay with their coworkers. Bierman & Gely, *supra*, at 168. Pay secrecy makes it difficult for individual workers to identify wage discrimination.

In addition, pay discrimination often takes the form of higher raises to men, rather than denial of pay raises to women. "Having received a pay increase, the female employee is unlikely to discern at once that she has experienced an adverse employment decision." *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 650 (2007) (Ginsburg, J. dissenting), *super-*

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[4] Discussion of wages is protected concerted activity under the NLRA. *See, e.g., Cintas Corp. v. NLRB*, 482 F.3d 463, 465–466 (D.C. Cir. 2007); *NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 534 (6th Cir. 2000); *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1511 (8th Cir. 1993); *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 66 (2d Cir. 1992); *NLRB. v. Brookshire Grocery Co.*, 919 F.2d 359, 363 (5th Cir. 1990); *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976).

seded by statute, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5, codified at 42 U.S.C. § 2000e-5. As a result, those workers who are the victims of discrimination are less likely to notice and protest it. Collective actions help overcome these information barriers, by providing potential plaintiffs notice of possible pay discrimination.

V. PERMITTING STRATEGIC MOOTING OF COLLECTIVE ACTIONS WOULD CONTRAVENE THE PURPOSES OF THE FLSA AND THE EQUAL PAY ACT, IN CONFLICT WITH THIS COURT'S PRECEDENT.

Genesis' proposed rule—in which the defendant in an FLSA or EPA action can "pick off" the named plaintiff prior to certification and thereby moot the action—would encourage strategic gamesmanship by defendants, and sharply undermine the purposes of the FLSA and the EPA. Maintaining the integrity of the judicial process by preventing such manipulation and preserving access to the courts have always been key concerns for the Supreme Court when considering the question of mootness. *See Roper*, 445 U.S. at 340; *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000) (the Court's "interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness"); *Bunting v. Mellen*, 541 U.S. 1019, 1021 (2004) (opinion of Stevens, J., respecting the denial of certiorari) (expressing a concern that in defendant's attempt to render a case moot, there is "the potential for gamesmanship").

As the Third, Fifth and Ninth Circuits have recognized, the interpretation of mootness that Genesis pro-

poses is tantamount to manipulation of the judicial process to circumvent the enforcement mechanisms that Congress intended to be central to worker's effectuation of their statutory rights. In the instant case, the Third Circuit observed that the defendant's rule "morphs" Rule 68 "into a tool for the strategic curtailment of representative actions"—an "outcome antithetical to the purposes behind § 216(b)." *Symczyk v. Genesis Healthcare Corp.*, 656 F.3d 189, 200 (3d Cir. 2011). The Fifth Circuit reached the same conclusion. It stated, "a ruling that a defendant *always* can 'pick off' a named plaintiff's FLSA claims before the plaintiff has a chance to certify the collective action would obviate one purpose of the collective action provision." *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 918-19 (5th Cir. 2008). The Ninth Circuit agreed, stating in *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011), that picking off "would effectively ensure that claims that are too economically insignificant to be brought on their own would never have their day in court."[4] If an offer of judgment moots a collective action, defendants will have a strong incentive to pick off named plaintiffs in this way whenever they believe a collective action may expose systemic abuses and incur a large financial loss or negative press.

The pernicious effects of such strategic mooting by defendants on workers' ability to enforce their rights are heightened in collective actions because the statute of limitations clock for a similarly situated plaintiff does

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[4] *But see Smith v. T-Mobile USA, Inc.*, 570 F.3d 1119, 1122 (9th Cir. 2009) (holding to the contrary when named plaintiffs voluntarily settled their claims and district court had already *rejected* certification by similarly situated individuals).

not stop until the plaintiff has opted into the lawsuit, in contrast to class actions, where the claims of all certified class members are considered to have been filed at the time of the initial class complaint. Thus, as the court below recognized, "[p]rotracted disputes over the propriety of dismissal in light of Rule 68 offers may deprive potential opt-ins whose claims are in jeopardy of expiring of the opportunity to toll the limitations period—and preserve their entitlements to recovery—by filing consents within the prescribed window." *Symczyk*, 656 F.3d at 200. Under Genesis' proposed rule, an employer could simply make a new offer of judgment to any newly substituted plaintiff, prior to notice of the action being given to the class of potential plaintiffs, and continue in this manner until the statute of limitations ran on the claims, thus avoiding liability to the class as a whole.

The instant case potently illustrates an additional problem posed by Genesis's proposed rule. Genesis made its Rule 68 offer a mere two weeks after initial discovery opened, and before Ms. Symczyk could move for certification.[5] If the defendant is able to curtail initial discovery through an offer of judgment in this way, then it will often be difficult, if not impossible, to identify and substitute another person as the named plaintiff. Without initial discovery of the identity of the other affected individuals on payroll and the scope of

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[5] Ms. Symczyk has a pending motion for certification and *Hoffman* notice made after the case was remanded to the district court but before certiorari had been granted. *See* Pl's Mot. For Condition Certification and Judicial Notice Pursuant to Section 216(b) of the FLSA, *Symczyk v. Genesis Healthcare Corp.*, 2:09-cv-05782-MMB (Apr. 12, 2012).

the violations, as a prelude to notice to those individuals of the claims and the right to opt in, *see Hoffman-LaRoche*, 493 U.S. at 170, the collective action provision will be functionally toothless in many cases.

This Court has recognized the evils of "picking off" in the Rule 23 context. *Roper*, 445 U.S. at 340, and *U.S. Parole Commission v. Geraghty*, 445 U.S. 388 (1980), speak directly to this issue. At the heart of these cases is a concern for ensuring an impartial court system is available to all. *See* 445 U.S. at 340. The reasoning of *Roper* and *Geraghty* applies with equal force in the 216(b) context. As the Fifth Circuit has stated, "[a]lthough the differences between Rule 23 class actions and FLSA § 216(b) collective actions alter the conceptual mootness inquiry, each type of action would be rendered a nullity if defendants could simply moot the claims as soon as the representative plaintiff files suit." *Sandoz*, 553 F.3d at 920. Permitting such strategic mooting of collective actions would leave vulnerable workers like the nursing home workers in this case without meaningful remedies under the FLSA and the EPA. A ruling for Genesis would violate the principles embraced by this Court in *Roper* and *Geraghty* and would undermine the purpose of the statutes the collective action was designed to enforce.

CONCLUSION

For these reasons and the reasons set out in Respondent's brief, the decision below should be affirmed.

Respectfully submitted,

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APPENDIX

The Service Employees International Union ("SEIU") is one of the largest unions in North America, representing 2.1 million men and women. As the largest healthcare union in the United States, SEIU represents more than 1.2 million workers in hospitals, nursing homes, clinics, home care agencies, and other healthcare institutions. Of particular relevance to this case, SEIU represents approximately 160,000 nursing home workers, of which nearly 4,900 are employees of defendant Genesis Healthcare Corporation in seven states. SEIU's interest in this case is in protecting collective actions as means of obtaining relief for Fair Labor Standards Act ("FLSA") violations, particularly in the nursing home industry.

The National Women's Law Center ("NWLC") is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights in all aspects of their lives. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace, with a particular focus on the rights of low-wage working women. NWLC's work to achieve fair pay for women includes efforts to strengthen the laws protecting women from compensation discrimination, enforce women's right to equal pay under existing laws, and increase the minimum wage. NWLC has appeared as *amicus* in numerous employment law cases before this Court.

Change to Win is a federation of four labor unions—the International Brotherhood of Teamsters, United Farm Workers of America, United Food and Commercial Workers International Union, and SEIU—which collectively represent more than five million

working men and women. Members of Change to Win's affiliated unions are employed in such varied industries as transportation, warehousing, retail food, food processing, health services, building services, garment manufacturing, laundry and gaming. Many of the members of Change to Win are low-wage workers whose ability to vindicate their rights under the FLSA would be significantly harmed if they are unable to do so through collective action.

The National Consumer Voice for Quality Long Term Care (the "Consumer Voice") was formed in 1975 as the National Citizens' Coalition for Nursing Home Reform. Members and subscribers to the Consumer Voice's information resources, from nearly all 50 states, comprise a diverse and caring coalition of local citizen action groups, state and local long-term care ombudsmen, legal services programs, religious organizations, professional groups, nursing home employees' unions, concerned providers, national organizations and growing numbers of family and resident councils. The Consumer Voice's mission is to represent consumers at the national level for quality long-term care, services and supports. That includes promoting the critical role of direct-care workers and best practices in quality-care delivery. The Consumer Voice has long held that a strong, stable, well-trained workforce is vital for quality of care and quality of life for residents. As such, the Consumer Voice has adopted numerous public policy resolutions, approved by its membership, recognizing the critical role certified nursing assistants hold in providing good care, including understanding of residents' needs and preferences.

The National Consumers League ("NCL"), founded

in 1899, is the nation's oldest consumer organization. The mission of the NCL is to promote fairness and economic justice for consumers and workers in the United States and abroad. The NCL is a non-profit advocacy group which provides government, businesses, and other organizations with the individual's perspective on concerns including, *inter alia*, child labor, workers' rights, and other work place issues. The NCL appears before legislatures, administrative agencies, and the courts across the country, advocating the enactment and vigorous enforcement of laws that effectively protect consumers and employees. For more than 100 years the NCL has worked to promote a fair marketplace for workers and consumers. This was the reason for the NCL's founding in 1899 and still guides it into its second century.

The National Partnership for Women & Families (formerly the Women's Legal Defense Fund) is a national advocacy organization that develops and promotes policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Since its founding in 1971, the National Partnership has devoted significant resources to combating invidious workplace discrimination, including compensation discrimination, and has filed numerous *amicus curiae* briefs in the Supreme Court and in Courts of Appeals to advance equal employment opportunities and to ensure strong enforcement of existing rights to fair pay.